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THE
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AS TO
PARTNERSHIP AGREEMENTS, LEASES,
SETTLEMENTS, & WILLS.

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THE INCORPORATED LAW SOCIETY.*

THE
DUTIES OF SOLICITOR TO CLIENT
AS TO
PARTNERSHIP AGREEMENTS,
LEASES, SETTLEMENTS,
AND WILLS.

BY
EDWARD F. TURNER,
SOLICITOR,

LECTURER ON REAL PROPERTY AND CONVEYANCING, AND ONE OF THE ASSISTANT
EXAMINERS FOR HONOURS TO THE INCORPORATED LAW SOCIETY.

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PREFACE.



THIS Volume, like my previous work on the duties owed by a solicitor to his client in connection with Sales, Purchases, and Mortgages of Land, is a revised and enlarged version of a course of Lectures delivered at the Law Institution. The reason which has induced me, with the permission of the Council of the Incorporated Law Society, to publish it is identical with that by which I was before influenced; viz., my belief that students in my own branch of the profession, while amply furnished with the means whereby to pass examinations, do not possess adequate aids, in the shape of books, to the mastery of what may be termed the higher duties, as distinguished from the minute details, peculiarly attaching to the Conveyancing work of solicitors. My resolution has derived additional strength on the present occasion from the favourable reception accorded to my earlier effort.

I have, as before, adhered to the mode of personal address originally adopted for purposes of oral delivery. Although, no doubt, to some extent anomalous in the altered circumstances of a printed publication, it possesses, I think, the advantage of conveying the meaning in a more direct and forcible way to the reader.

I must plead guilty to having designedly introduced somewhat daring innovations upon the style of composition which has come to be regarded as inseparable from law books.

I have certainly had no desire to trifle with important and serious subjects; but I venture to hold, and have endeavoured to act upon, the view that, as medicines do not produce beneficial results in proportion to the degree of their unpleasantness to the taste, so the driest educational books do not command the closest attention, or leave behind the most durable impressions on the student's mind.

I am indebted to my friend Mr. Joseph Addison for many valuable suggestions with which he has most kindly favoured me both before and during the passage of this work through the Press.

E. F. T.

May, 1884.

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ERRATUM.

Page 141, line 17—*For* "32 & 33 Vict," *read* "33 & 34 Vict."

FIRST LECTURE.

INTRODUCTORY MATTER.

PARTNERSHIP ARTICLES.

- { PRELIMINARY ADVICE.
- { LEGAL COMPETENCY OF INTENDING PARTNERS.
- { THE TWO CLASSES OF PARTNERSHIP:—
 - { (A) ENTRANCE OF NEW PARTNER INTO ESTABLISHED BUSINESS.
 - { (B) CREATION OF NEW PARTNERSHIP BUSINESS.
- { DRAFTSMANSHIP OF ARTICLES.

FIRST LECTURE.

IN selecting the subject-matter of these Lectures I pur-
posely, and for very obvious reasons, chose ground
widely removed from that of the Lectures, which, by
the favour of the Incorporated Law Society, I delivered
on a previous occasion (*a*). But I also purposely, and
for reasons which will, I hope, commend themselves to
you as we proceed, looked at my new subject from my
old point of view, and as I was at some pains to explain
in my first course of Lectures what that point of view
was, I will preface this Lecture by repeating the sub-
stance of a few observations of a general or introductory
character of which I before made use. I do so because
they strike as clearly as I am able to do the key-note of
my method of lecturing, and will, I think, enable us to
turn to our subject with a better mutual understanding
than would be the case if I were to plunge *in medias
res* at once. At the commencement of my first Lecture
I said :—

Introductory.

“ In preparing the course of Lectures of which I am
“ about to deliver the first, I considered at the outset
“ somewhat anxiously how I might best hope to attract
“ the attention of all my listeners. I felt that if I were
“ to make at starting some such observation as that an
“ estate in fee simple is an estate to a man and his heirs,
“ and is the nearest approach to the absolute ownership
“ of land of which the law theoretically permits, I should
“ probably not be adding to the stock of knowledge

(*a*) See Turner's Duties of Solicitor to Client as to Sales, Purchases, and Mortgages of Land.

“ which you already possess. On the other hand, if I
“ were to go to the opposite extreme and cite without
“ explanation some complicated passage taken, let us
“ say, from Mr. Lewis’s book on Perpetuities, I should,
“ perhaps, not wrong some among you who may not
“ have been travelling so long on the highway of the
“ law as others, or who, from a variety of causes, may
“ be less advanced in your studies, if I were to anticipate
“ that you would follow me with difficulty. I am free
“ to confess, however, that in the particular matter to
“ which I am referring—the importance of endeavouring
“ to present to you the right medium in point of diffi-
“ culty between the A B C of my subject and the X Y Z
“ —my task is easier than was that of the Incorporated
“ Law Society’s Lecturers before the institution of the
“ Elementary Classes. For whereas they were wholly
“ without the means of knowing how far the students
“ who heard them had mastered the first principles of
“ the law of Real Property, I am able to assume con-
“ fidently—as I do—that many of you have attended
“ the Elementary Classes, and that all of you have,
“ more or less, made yourselves acquainted with the
“ portion of Stephen’s Commentaries selected for the
“ Intermediate Examination.

“ This being so, it appeared to me that my best course
“ would be to assume that I should, as it were, be
“ addressing myself to rows of animated Stephen’s
“ Commentaries—in other words, to credit you at start-
“ ing with such an amount of knowledge as a student
“ might reasonably be expected to have gained from an
“ intelligent perusal of that work. I am well aware
“ that some of you may have already pursued your
“ course of reading to much greater lengths, while to
“ others that book alone, which is not a small one,
“ may have been rather a difficult problem to solve.
“ But I would say to those who fall under the first
“ heading that if I appear to you here or there to

“lay stress on points with which your minds are
“already stored, I would venture to recommend you
“not on that account to let your attention languish.
“If the principle itself be good, you cannot have it
“too much at your fingers’ ends, and familiarity
“will certainly not breed contempt. And those again
“of you—if any such there be—who may not easily
“be able to follow every part of every Lecture, I
“would beg not to be discouraged by your inability to
“understand clearly any particular sentence or idea. If
“you give your whole attention to it the difficulty will
“be certain to dissolve—if not now, a little later on.
“Many an artied clerk has completed his course and
“carried into the practice of his profession valuable
“knowledge owing its foundation to something which
“he did or heard or read in the earliest days of his
“student’s life, and of the real meaning and object of
“which he had, perhaps, at the time, only the dimmest
“perception. The great thing is to try your hardest
“and best to take in and understand what you read
“and hear, and never to let an available opportunity
“pass of obtaining an explanation as to anything which
“you cannot understand. But to that advice I would
“add my earnest counsel to you not to reject one atom
“either of principle or practice merely because you do
“not at first appreciate its full bearing.

“There is one other point also as to which I wish to
“say a very few words by way of general introduction.
“In addressing myself in these Lectures to the duties of
“solicitors, it is my purpose to deal in a broad and
“comprehensive spirit, to the best of my ability, with
“what I may term the larger and higher duties rather
“than with the minutiae of the daily routine of a
“solicitor’s office work, although in a sense these latter
“may of course just as appropriately come under the
“denomination of a solicitor’s duties. My reasons for
“this are twofold, and both will I think be obvious to

“ you. One is that the best, and indeed the only place
“ in which to study with advantage the smaller details
“ of your professional work is the office in which you
“ are serving your Articles. ‘The other is, that if I
“ were to attempt to dwell on petty incidents of Con-
“ veyancing Practice, such matters for instance as the
“ use of coloured inks for showing distinctive alterations
“ in a draft—I should need the permission of the Council
“ to deliver not nine but ninety Lectures, and I doubt
“ whether many of you could endure their intolerable
“ dulness. My object, briefly, is to assist you to a com-
“ prehension of those duties of a solicitor of which the
“ competent performance is not to be ensured merely
“ by watching and imitating what you see others in the
“ same office doing around you, but which, on the con-
“ trary, can only be adequately discharged if you
“ approach them with an understanding mind.”

At another part of my Lecture I referred to the employment of counsel in conveyancing matters in the following terms:—

“ It may perhaps be well if I say at this point that
“ throughout my Lectures I shall draw no distinction
“ between the cases in which a solicitor resorts for
“ assistance to counsel and those in which he does not,
“ but shall assume that every step is taken by the
“ solicitor alone. His responsibility at various stages
“ of conveyancing work is frequently lightened by
“ recourse to the skill and experience of counsel, and I
“ am not for a moment saying that you may not have
“ a great number of cases in practice in which at all or
“ most of the successive stages you will be very wise to
“ avail yourself of that assistance. On the other hand,
“ in conveyancing work, unlike contentious business,
“ there is no line drawn as to what solicitors may and
“ may not do personally; and it is the fact that many
“ conveyancing transactions are carried out in a
“ solicitor’s office without the employment of counsel

“ at all. It would be impossible for me to attempt to
“ define any particular class of cases in which a vendor’s
“ solicitor should avail himself of the services of counsel.
“ If I were to advise you to let the degree of difficulty
“ be your test, I should fail to cover the many instances
“ in which, though the difficulty is perhaps great, the
“ smallness of the amount involved, or the circumstances
“ of your client, render it most desirable that you should
“ save him from any expense which can possibly be
“ avoided. Again, if I were to recommend you to be
“ guided by the amount and importance of the trans-
“ action, I should perhaps be nearer the mark ; but
“ the advice would have no apt bearing upon many
“ cases in which, though the amount is large, the work
“ happens to be peculiarly light and easy. In truth it
“ is a matter as to which you must judge each case on
“ its merits, and exercise your own discretion to draw
“ the line at the right point between avoiding, on the
“ one hand, entailing unnecessary expense on your
“ client, and on the other hand, assuming a weight of
“ responsibility which you may fairly share with some
“ counsel learned in the law.

“ While, therefore, excluding any further reference
“ to the employment of counsel, otherwise than per-
“ haps incidentally, from my Lectures, you will under-
“ stand that my observations are all made subject to
“ this tacit reservation, that when the circumstances
“ reasonably require it, a solicitor will avail himself of
“ the assistance of counsel, and you will of course also
“ understand that, as a necessary consequence of his so
“ doing, his personal responsibility will be propor-
“ tionately diminished.”

The third and last passage which I will venture to quote is a confession of my unalterable faith as to the extent to which it behoves a solicitor for his clients’ best interests, and the sake of his own reputation, to master the law of England. I said on this point :—

Bearing of
principles of
law on duties
of solicitor.

“As I may probably use more than once, in the
“course of my Lectures, the expression ‘general
“principles of law,’ I will at once explain what I mean
“by those words in connection with the professional
“duties of a solicitor. It is a somewhat disputed point
“as to how much of the law of England solicitors
“ought to know. There are those who are good enough
“to say that very few solicitors know anything about law
“at all; and again there is another class of philosophers
“who assert with great confidence that solicitors need
“not know anything about law—that if they possess
“sound judgment and common sense, and a capacity
“for business generally, all the rest may be left to
“counsel.

“Now I emphatically dissent from both of those
“articles of faith, and I as emphatically advise you not
“to enter upon your professional lives with any such
“false doctrines in your minds. That it is possible, or
“necessary, or even desirable for a solicitor—dealing as
“he has to do with every form and variety of non-
“contentious and contentious practice—to be as pro-
“found a master of any particular branch of the law
“that comes before him as the barrister whose practice
“lies more or less in that particular branch, and who
“can pursue his researches without any of the thousand
“and one petty distractions of a solicitor’s business, I
“do not for a moment assert. What I do contend is
“that the aim of student and practitioner alike in our
“branch of the profession should be to master the great
“abiding principles of law. The infinite varieties of
“the transactions of men, or the refinements of this or
“that doctrine, may render the application of those
“principles difficult at times; but if they are rooted in
“your minds you will possess the solid foundation of
“sound knowledge and understanding of your work;
“you will be able to judge whether in any given
“circumstances there is something which in the interests

“ of your client should be avoided, or desired, or looked into critically, or submitted for the mature consideration of some counsel versed in the spécial class of case; and more than that, you will be infinitely better able to deal with those sudden emergencies which arise in every solicitor’s practice, and call for instant and unaided decision upon matters of perhaps the gravest importance.”

I turn now from the general to the particular, and it is my purpose in this and my next following Lecture to invite your attention to the practical duties owed by a solicitor to his client in connection with the formation of a private partnership, by which I mean a partnership in the ordinary sense of the expression as distinguished from the artificial semblance of that relation represented by the ownership of shares in a joint-stock company.

Subject of
first and
second Lec-
tures.

No one who attempts to master the leading principles of partnership law, or who has any practical experience of the formation and incidents of a partnership, can fail, I think, to be struck with this one reflection above all others—that when every provision which ingenuity and experience can suggest has been introduced into partnership articles—when clauses providing for every possible foreseen contingency, and defining in the most minute way the rights and obligations of the partners, have been piled on each other—there still remains from the necessities of the case an open field of risk and insecurity which owes its existence in part to the imperfections of human nature, and in part to the cardinal distinctions of law between the relations in which partners stand towards each other, and those which they occupy with reference to the outside world. A skilful and experienced solicitor may perform very effective services to his client in connection with the adjustment of the terms of a partnership agreement, but the key-note of the arrangement first and last must

Observations
on partnership
relation.

be the mutual confidence of the partners in each other. If they do not possess that when they start, or if they lose it afterwards, then the sooner they part company the better. And if confidence reposed in a partner proves to be thoroughly misplaced, the consequences will be made little if at all less disastrous by the provisions of the partnership articles, no matter how carefully they may have been framed.

Solicitor's
advice at
preliminary
stage.

Now it may be said and in one sense truly said, that it is no part of a solicitor's duty to concern himself with any question as to the degree of confidence which intending partners may have in each other—that this is a matter personal to the parties and lying outside the province of their professional advisers. But it seems to me that that is a very narrow and inaccurate conception of the position which a solicitor occupies to his client. I should hardly be prepared to concur in it to its full extent even if the point involved no appreciation of legal principles, and the solicitor's function in this respect could only at the most be described as the expression of an opinion by a man of the world who has had special means of forming a sound judgment upon the business affairs of life generally. But that is not in truth the limit at all. The opinion which a well-instructed solicitor may express to his client on this subject, if the opportunity offers for doing so, will be based at least as much upon his knowledge of the law as upon his experience of life—for the conclusive reason that the need of profound mutual confidence is largely necessitated by the legal power which one partner possesses of plunging another into dangers and difficulties.

There are partnerships and partnerships, and in many cases it would be quite inappropriate, in some wholly out of the question, for a solicitor to give advice upon these preliminary considerations to which I am now directing your attention. The character and position of the business, or the personal relations of the parties to each

other, or the circumstances in which your client is entering into the arrangement, or other causes, may reduce your functions strictly to those of preparing or advising upon the provisions of the proposed partnership articles, and may preclude the consideration of any question as to whether there is or is not to be a partnership at all. In a rather lesser degree the same observation will apply also where your client is self-reliant and does not seek the benefit of your judgment, but merely asks you to register and give practical effect to his own decision. I refer rather to the cases with which you will have to deal, where your client does wish to be guided more or less by your judgment and experience, and where also the circumstances appear to you to call for the exercise of care and caution on his part before he is irrevocably committed to the step which he proposes to take. If he is purposed to join a concern already established, you might with advantage to his interests press upon him the need of his being well assured of its stability and soundness; and in the same case, and also where the object of the proposed partnership is to start a new business, you would lay stress upon the importance of his being thoroughly satisfied of the character and responsibility of those with whom it is his intention to associate himself. If there appears to you reason to fear that he is being led by a sanguine temperament into a visionary or impracticable scheme, or the adoption of an occupation for which he has no training or aptitude, you would harp upon the string of caution and reflection, and bid him consider well how easy it is to create, and how difficult often to dissolve, the partnership relation.

Such advice as this savours at first blush of the mere generalities of worldly wisdom, but I venture to assert that many and many a man has gone with a light heart into what has proved to be his ruin for want of it, and many a man has been saved from ruin by it; and I

repeat what I said just now, that to a great extent the source and fount of it spring from nothing more or less than scientific legal principles, which should be thoroughly familiar to you and would certainly not be familiar to your client, though here and there he may have gained an imperfect smattering of them—I mean the principles of law which, though they operate in various shapes and forms, resolve themselves always into these :—

First principles of partnership law.

First, that the internal relations of partners to each other, the stipulations and provisions and restrictions, whether made by a written instrument or verbally as between themselves, do not bind a third person unless brought to his knowledge ; and

Secondly, that each partner, so far as the outer world is concerned, is the accredited agent of the rest, and as such has authority to bind them by simple contracts respecting the goods or business of the firm, falling in kind within the ordinary course of the firm's business to any person dealing *bonâ fide*, and who is not aware that the transaction is in violation of the partnership stipulations (*b*).

Let us apply that law to an imaginary case, and you will follow my reason for laying stress upon it and my anxiety that you should have it thoroughly in your minds when you are consulted, in the larger sense which I am supposing, as to an intended partnership.

Their application illustrated.

A young man is anxious to go into some business, and he sees an advertisement in the paper which states that a gentleman is desirous of being joined by another gentleman possessed of capital to develop and work a lucrative business which cannot fail to produce all sorts of wonderful results. He has some capital, and he thinks that the advertisement points to the very thing he wants. Communications ensue. The advertiser seems to him to be everything desirable, and the matter

(*b*) See Smith's Mercantile Law, 8th edit. p. 37.

is brought to you as the solicitor of the young man's family to carry out the arrangement. We will suppose in the particular case that neither the young man nor anyone who instructs you on his behalf is an acute man of business, though even acute men of business do rash things at times when handling unfamiliar subjects, and the young man's parents will probably consider that they are showing a great deal of severe sense if their instructions comprise a request to you to be very particular about the terms of the partnership agreement. Will you prepare it right out of hand without a word of warning or not? Is it no affair of yours that your client may be—not necessarily will be, but may be—entangling himself with a man who will plunder and ruin him, and to whom at least, and this is the point, the *power* to do so is being given without any sufficient investigation to afford a reliable opinion that he will not avail himself of it?

Surely you will make it your affair to place the matter in its true light before those whom it so vitally concerns. I am not of course saying that there is no limit to the power of which I speak—it must be exercised within the compass of the partnership business—but that will almost surely be a sufficiently wide limit to spell ruin readily enough if any partner lays himself out for its doing so. It is easy enough to see that if I join a solicitor in partnership I cannot be held liable if he chooses to buy race-horses in the name of the firm without my knowledge; but suffer me to give you an illustration of the other side of the picture. I take it almost at random from a reported case of *Cleather v. Twisden* (L. R. 24 Ch. Div. p. 731). The head-note of the report, which is sufficient for the purpose I have in view, is as follows:—

“Trustees deposited with a solicitor certain bonds payable to bearer. *His partner had no actual knowledge of this*, but letters referring to the bonds were

“charged for in bills of costs delivered by the firm ;
 “letters referring to the bonds were also copied into
 “the letter-book of the firm ; and cheques for money
 “received as interest on the bonds were drawn on the
 “account of the firm. The solicitor made away with
 “the bonds. Held, that under the circumstances his
 “partner was liable.”

That case coming home as it were to our own door as solicitors will, I think, inspire you with a due sense of the immense responsibilities of partnership.

Practical
 conclusion to
 be drawn.

Briefly, then, I think that your knowledge of the all-important principle of law to which I have referred may well and rightly be used in fitting circumstances to enlighten a client who labours, as most laymen do, under the delusion that the partnership articles will be an effective charter of safety to him, and that acts done in contravention of them will be null and void as against him ; and beyond that you may, I think—though I do not press this so confidently upon you or pretend to describe it as falling within the four corners of your strictly professional duties—usefully go to the extent of expressing your opinion where it is sought, or at least is not repelled, upon other points as to which your training as men of business—your habits of accurate thought and observation—may enable you to state your views with advantage to your client.

We will now lay aside this preliminary aspect of my subject and assume, as our starting-point, that a partnership is to be formed between two or more persons.

Knowledge
 needful for
 draftsman.

In an edition of Bythewood's Precedents, published upwards of fifty years ago, the observation was made that without some knowledge of the principles governing the general rights and obligations of partners, a person could not satisfactorily sit down to the task of drawing the instrument by which those rights and obligations were intended to be defined and regulated. Since those words were written great changes have

taken place in every department of our system of jurisprudence, but the force of the observation itself is imperishable, and applicable alike to the law of that time, of our time, and of all times, without exception or qualification, and I adopt it as my key-note.

All of you, no doubt, are well aware that notwithstanding the importance of the contract of partnership, the relationship may be created in all sorts of informal ways, and that the two questions—first, whether or not people are partners *inter se*, and secondly, whether they are partners in so far as third persons are concerned, are not by any means identical, and are in many cases not easy to answer, but, on the contrary, as difficult as any that present themselves to the lawyer. But adhering, as I wish to do, as closely as I can to the metes and bounds of my subject, I must needs leave that field of law unexplored, because I can only proceed in a Conveyancing Lecture upon the supposition that the parties resort to a solicitor to have their bargain deliberately carried out by a fitting instrument defining their rights and liabilities to each other, and with the intention of entering into a partnership which will, beyond question, present them in that light to third persons.

How partnership may be created.

Now, the first question which will arise in a lawyer's mind when he is asked to carry out this contract must naturally and properly be—Are the proposed partners legally competent to enter into a partnership agreement which shall be mutually binding upon them? Let me clear the ground at once here by saying, that the determination of this question will be dependent upon no statute or common law applicable to partnership as distinguished from any other sort of contract, but strictly upon principles which apply to contracts generally. The practical results of these principles on the matter of competency in partnership contracts may be shortly summarised as to the principal disabilities—

As to legal competency of intending partners.

those of infants, lunatics and married women, as follows:—

Infants.

First, that a partnership should under no circumstances be entered into with an infant, for the very sufficient reason that to do so is an almost literal exemplification on the infant's part of that species of speculation in coinage, known as "heads I win and tails you lose." For he will be at liberty to avoid the contract at any time before or within a reasonable time after he attains full age. And although on equitable principles he will not, as against his partner, be allowed to take credit for profits, while at the same time he repudiates losses, he will, except in extreme cases of deception on his part amounting to fraud, be free to repudiate the liabilities both as between himself and his partner, and as between the firm and third persons (*c*). It follows that the position both internally and externally of a person who takes unto himself an infant partner is about as undesirable as it can well be.

Lunatics.

Secondly, as to lunatics, it is well settled, both that a lunatic is capable of being a partner, and also that a partnership is not *ipso facto* dissolved by the fact of one of the partners becoming a lunatic, though the Court will generally, if its aid be invoked, grant a decree for dissolution on that ground (*d*). It may be presumed that no client of yours is likely to come to you and say, "I want you to prepare a partnership agreement between myself and Mr. A. B. I may just mention that he is out of his mind;" and it is hardly needful therefore that I should dwell on the question of a lunatic's competency; but you may, at all events, profitably bear in mind that lunacy does not dissolve a partnership without recourse to a Chancery suit.

Married women.

Thirdly, as to married women. The first principle to bear in mind is, I think, this—that, apart from her

(*c*) Lindley on Partnership, 4th edit. p. 81.
(*d*) *Ibid.*, p. 224.

separate estate, and except when the husband is a convicted felon, or the husband and wife are judicially separated, or the wife has obtained a protection order under the Divorce Acts, or the husband is an alien enemy and abroad, or where the custom of London applies, by which a married woman is placed as to her contracts in the same position as a *feme sole*, a married woman is unable to make any binding contract (e). But whereas the qualification as to separate estate in that sentence amounted formerly to very little for practical purposes, it now possesses a most important meaning, for the simple reason that the doctrine of separate estate has received immense impetus from modern legislation, and in particular of course from the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). If you study that Act with care your reflections upon the logical result of its provisions will, I think, lead you to the conclusion that in the matter of contract it revolutionizes the relative positions of husband and wife, both by the wide area over which it spreads the definition of separate estate, and by the facilities which it affords for enabling married women to bind that estate, and to be held liable to their obligations even to the gates of bankruptcy.

I take it that at the present moment a married woman may do whatever she pleases, wise or unwise, with her own property, and that if she chooses to enter into a partnership contract she is at perfect liberty to do so. But I imagine that whatever may be the case with contracts not involving the expenditure of personal time, the husband would still, in his marital capacity, have the power, if he desired to exercise it, of declining to allow his wife to enter into a partnership agreement containing the usual engagement to devote her whole time and attention to the partnership busi-

(e) Lindley on Partnership, 4th edit. p. 84.

ness, and that he would be within his legal rights in pointing out respectfully that she was already under an implied legal obligation to stop at home and mind the baby. Short, however, of interference on the husband's part, upon personal or marital, and not upon financial, grounds, and within the limit—and although it is now a very extended one it still is a limit—that she can only contract so as to bind her separate estate, you may take it to be clear that a married woman is competent to enter into a partnership agreement.

Nature of
intended
partnership.

Assuming either that there is no question as to the competency of the contracting parties, or that any question which you have thought it necessary to raise on that head is disposed of, the next subject to engage your attention will be the nature of the partnership, and from this point of view it is obvious, in the first place, that every partnership must fall within one or other of two primary divisions.

Two primary
divisions.

The transaction must either represent the admission of a partner into a business already established, or the formation of a partnership to carry on a new business. Many considerations will apply equally to both of these classes, but there is one important distinction between them which should always be present to your mind, viz., that in the first case it will, and in the second it will not, be necessary to provide by the partnership articles for the mode of dealing as between the old and new firms with the assets and liabilities as existing at the date on which the fresh partnership commences.

Principal
distinction
between them.

Position of
new partner
as to debts of
old firm.

Where you have to deal with the former class of partnership, then this matter will claim your first attention; and I think that you may, in the first place, usefully store your minds with a principle simple enough in itself, but not by any means always easy of application—that, so far as liability to third persons is concerned, an incoming partner is not liable for any of the debts of the old firm, no matter what may be

the terms of the partnership articles. He may, of course, as between himself and his partners make himself liable for such debts, and it was formerly considered that such an agreement was evidence of his having made a similar agreement with the creditor; but, as is pointed out in Lindley on Partnership (*f*), "this is certainly not enough, for the agreement to be proved is an agreement with the creditor, and of such an agreement an arrangement between the partners is of itself no evidence."

The difficulty in applying this principle arises, as you may suppose, in cases in which it is open to dispute, upon the facts, whether there is or not sufficient evidence of an express or implied contract between the incoming partner and the creditor that the former shall be liable for a debt contracted before his entrance into the firm, and as to this there are a good many authorities. But I do not feel at liberty to elaborate the point, because it does not bear otherwise than in a general sense upon my present subject, and I am more concerned to point out the aspect which the matter assumes practically as between the partners themselves.

Now, of course, it is competent for the members of an existing firm and a new partner who is joining it to make any arrangement they please, and if they are acute men of business, and have had some experience of partnership relations, you may not have very much more to do with this matter of adjusting old assets and liabilities than to express in clear and accurate language a cut-and-dried arrangement, of which the outline is already determined on. But in most cases you will have the opportunity of exercising your inventive and suggestive faculties more freely in connection with the terms of partnership articles than with almost any other class of instrument, and of this, as in many other

Solicitor's
part in adjust-
ment of old
assets and
liabilities.

things, it may be said that the more you save your client the trouble of thinking out details for himself the better he will like it, and the more will he come to repose confidence in you.

And even where you are not called upon to take much or any responsibility in the particular matter of suggesting and originating the principles or details of the partnership scheme, you may depend upon this, that if you have acquired some familiarity with the different methods in which the more important features of a partnership arrangement are usually dealt with, and the considerations bearing upon them, your task as a draftsman will be infinitely facilitated by the clearness of your perception of what it really is that you are asked to develop into a logical and complete document; and you will be able not only to save yourself a good deal of trouble, but you will also—which is very important in your own interests—be able to save your clients a good deal of trouble by relieving them from the necessity of explaining all sorts of minute details to you. It is a natural attribute of a great number of clients, that what they understand themselves they will expect their legal advisers to understand also, almost by intuition, and I am persuaded that nothing pleases a man better than to be able to easily instruct his solicitor. A shipbroker who wishes to be advised about a charter-party, or a Mincing Lane broker who has a knotty point upon a trade contract which, to the uninitiated, looks like a concise problem in double Dutch, is generally drawn by a sort of process of selection to some solicitor who is supposed to be well versed in the technicalities of the particular sort of document, and hence it is that in the City of London and other large cities so many legal practitioners work largely in a particular groove, and have the reputation of being specialists.

Now it may not fall to the lot of all, or even of

many of you, to become specialists, but it will certainly fall to your lot to experience the need of becoming active-minded men of business, no matter what may be the sphere of your practice, and I am anxious to impress upon you that you will be wise in your generation if you avail yourselves of all the opportunities which come in your way, or which you can gain by going out of your way, to obtain a good all-round knowledge of the business affairs of men; and the expediency of acquiring a general understanding of what is involved in a partnership agreement—over and beyond the actual principles of law involved in it—furnishes a conspicuous illustration of my meaning.

I shall therefore, I think, usefully employ a little of our time in placing before you a few of the points which suggest themselves upon this part of my subject.

Points for consideration under this head.

It is evident that, generally speaking, in the case of admitting a new partner into an existing business, the assets and liabilities of the old firm would be linked together, and that both would, in some shape or other, either be taken over by the new firm, or would be retained and dealt with by the old firm; in which latter case the new firm would start as if it were, in this respect at least, an entirely new concern.

Alternative methods considered.

Where the former plan is adopted, it is important that the members of the new firm, and in particular, of course, any fresh partner who is coming into the concern, should be placed in possession of an accurate and reliable statement, in the form of balance sheet or otherwise, of the assets and liabilities, and that on the faith of this statement, and in point of draftsmanship by reference to its contents, the arrangements as to such assets and liabilities should be made.

First method —Assets and liabilities of old firm taken over.

The nature of those arrangements would of course depend greatly on circumstances. One method is to transfer to the new firm at a valuation all the assets subject to the liabilities, and to leave to the new firm

the profit or loss which the actual realisation may show as compared with the valuation figure. In this case the members of the old firm would be credited in whatever might be their agreed shares with the estimated surplus of the assets over the liabilities, as being in whole or in part, as the case may be, their contribution to the capital of the new firm. A very simple illustration will show you the working of that arrangement. A. and B. having been in partnership for some time, admit C. into partnership. The assets of A. and B., including the value of a lease of the partnership premises, outstanding debts due to them, good-will, stock-in-trade, everything, are valued at £10,000, and the liabilities are computed at £2,000. The assets would all be made over to the new firm, and the surplus of £8,000 would be carried as capital to the credit of A. and B. in whatever shares they may under their own arrangements be entitled to it, while C. will of course contribute whatever may be his agreed share of capital in the new firm. If it should ultimately turn out that the surplus assets are worth more than £8,000, so much the better for the new firm; if otherwise, so much the worse.

This arrangement may, of course, be modified in all sorts of ways. C., for instance, instead of bringing in his share of capital as cash, may pay A. and B. for some agreed share in the surplus assets taken at the valuation figure, in which case his interest in the concern will be carved out of the existing interest of A. and B., instead of his entrance into the firm representing an accession of capital. In this case if C. were to come into a fourth share of the business, and A. and B. were interested in the £8,000 in equal shares, C. would pay them each individually £1,000, and then the assets would be held in the proportions of £3,000 each to A. and B., and £2,000 to C.

Or, again, instead of the new firm standing the

chances of loss if, on the realisation of the surplus assets, they fall short of the amount at which the members of the old firm are credited, a guarantee may of course be given by the old members that all, or some, of the old assets shall not realise less than so much.

I mentioned as an alternative plan that of the old partners retaining their own assets and liabilities—or, in other words, winding-up the old partnership independently of the new concern altogether. In this case if, as may often happen, the capital of the members of the old firm is locked up for a more or less extended period, and they are unable or unwilling to provide capital for the new firm from any other source, the plan may be adopted of their guaranteeing, by the partnership articles, to bring in specified amounts at fixed dates which are calculated so as to afford time for the realisation of the surplus assets of the old firm; but this, of course, is a matter for consideration, and to be dealt with by the light of the particular circumstances.

Second method—Old firm's assets and liabilities not taken over

Now of course it is for the parties interested to choose between these two modes of dealing with the assets and liabilities of an old firm when a new one is formed. The members of the old firm may desire to retain the assets or they may not; the new partner may be anxious that they should be brought in, or he may prefer that the business should start afresh with a capital of so much cash. But I may usefully draw your attention to one very important factor in the calculation—the nature of the business. With some classes of business there is practically no connecting link between the actual business transacted to-day and the business transacted to-day month. Take the case of a stock-broker. His capital is not represented by costly plant, machinery or stock-in-trade. He makes his profit in an office consisting perhaps of a couple of small rooms, and the tenancy of that office, the length of

notice to be given to a couple of clerks, and the current transactions which will culminate on the next settling day, may be the only tangible matters which stand between him and the winding-up of his business at any moment. It is obvious that if he takes a partner, the determination of the question whether that partner shall be directly or indirectly concerned with business wholly or partially transacted before the date of his admission into the firm will present little difficulty.

But reverse the picture, and let us suppose that the capital of the business is largely represented by plant, machinery, goods and business premises—or that the capital of the old firm is sunk in advances made abroad to colonists on the security of land, which advances may not be paid off for years, and the gradual realisation of which will carry with it the profit of the transaction, and necessitate so much care and attention, that it will in fact represent in itself the carrying on of a business for a long time to come. In such cases as these a totally new departure—the drawing of a line hard and fast between the old business and the new would be almost impossible. In the instance which I last supposed it might be years before the new firm would raise up a fresh business unconnected with the transactions existing when it commenced, while such of the partners as belonged to the old firm would be, of necessity, giving a large part of their time and attention to the realisation of their outstanding assets.

The illustrations which I have given represent extremes between which of course lie many intermediate cases differing in degree, and as to which the mode of dealing with this subject of old assets and liabilities may present very debateable features. But extreme instances serve well to elucidate a principle, and you may usefully bear in mind as a guiding rule that the solution of the question whether a new firm is to be concerned with the assets and liabilities of an old

one will largely, though not conclusively, depend upon the degree of ease or difficulty with which the transactions or the trade property of the old firm can be severed or kept distinct from the new partnership concern.

I should be very sorry if any of you were misled by what I have been saying, and, therefore, let me at the risk of repeating myself say once more, and once for all, that in these matters of bargaining I do not for a moment suggest that it is your duty to decide for your client whether it will or will not suit his purpose to enter into partnership on any given terms. The decision and the responsibility for it must be his, and you would be very foolish to assume it. I am only seeking to convince you that you may render him great service, enhance your reputation in his eyes, and lighten your own task of preparing or settling partnership articles by bringing to bear upon the subject the intelligence of a competent man of business, and by being able with confidence, when the opportunity offers, not to decide such points as I have mentioned, but to suggest to your client considerations which should influence his decision, and to steer his mind into the right channel for coming to a sound conclusion.

The solicitor's true functions in these matters.

In the case which I am supposing of a taking over of the assets by the new firm there is one matter requiring attention which appertains to the lawyer strictly—I mean the task of seeing that any assets the transfer of which requires special formalities are effectively transferred. If, for instance, the value of freehold or leasehold premises belonging to the old partnership is brought into account, obviously the new partnership should have them properly conveyed, and it would be your duty to see that this is done.

Need for effective transfer of old firm's assets where taken over.

Conveyancing work of that sort would of course fall necessarily to you as the solicitor concerned, but in the case of a transfer to the new firm of pure personalty, as,

for instance, shares of ships, the mode of transfer, even where it is attended by some necessary formality, is often so simple that the client will be tempted to save the lawyer's charges and do it himself. But at all events the transfer of the assets, whether real or personal, is a matter for you to bear in mind, to point out, and, if it be so desired, to practically carry out.

As to old
firm's
liabilities.

I have said that the assets and liabilities are closely connected, and, with regard to the latter, I think you may take it that when a new firm absorbs the assets it should in terms agree to discharge the liabilities—assuming, of course, that in the particular case such is in fact the intention of the parties. It is only fair that where the old firm parts with its assets on the faith of, among other things, being relieved from its liabilities, the intention should be clearly and unequivocally expressed in the matter of the liabilities.

Negotiation
of terms of
partnership.

These matters of arrangement as to assets and liabilities, and many other provisions of a partnership agreement, need of course delicate handling, and especially where, as is frequently the case with partnership agreements, all parties are represented by one solicitor. It is easy in such cases to wound the susceptibilities of your clients, or to lead one partner to think that you are leaning unduly in favour of another partner—and the position is more difficult still where you have to use your influence and tact to restrain within bounds a demand which you think inequitable or unfair. But there is one rule by which to guide your course, and which will generally keep you straight if you hold steadily to it—to remember yourself, and to impress on your clients, that in the end an arrangement fair and just to all parties is the best for all. It will generally profit a man very little to gain some extreme point, upon which he has insisted in his own interests and without regard to the consideration due to others, if he has carried it with the result of

leaving a burning sense of injustice in the mind of the man to whom he is linked in what must be a most intimate, and should be a most cordial and confidential, relation. You cannot too strongly—though of course always within the limits of your proper function—use your influence in the direction of bringing about what appears to you, if you have the means of judging about it, to be right and reasonable in view of all the circumstances—and it is my belief that a reputation for calm judgment and conspicuous fairness of mind is as important to a solicitor as a reputation for knowledge of law, although, as I have already said, I utterly dissent from the proposition, which is sometimes confidently put forward, that few solicitors do, and no solicitors need, know anything about the science of law at all.

I have devoted, but not I hope unprofitably, a good deal of space to this matter of old assets and liabilities, because in a large proportion of cases it is an important element in the scheme of a partnership, and is often, I think, not very clearly understood. But we will now leave it behind and proceed to consider the subject of partnership articles in a more extended sense, and upon a footing applicable alike to partnerships in old and new businesses.

As a general rule, partnership articles are of very great length. This fact is not to any considerable extent due to the vice, which formerly pervaded all deeds, of pure and simple outrageous manufactured verbosity, but to a different cause.

Partnership articles usually of great length.

It has been observed by Lord Justice Lindley, in his work on the Law of Partnership (*g*), that partnership articles are not intended to define, and are not construed as defining, *all* the rights and obligations of the partners *inter se*; that a great deal is left to be understood, and that although the maxim *expressum facit cessare tacitum*,

Necessity for many usual provisions considered.

applies to partnership articles as to other agreements, the rights and obligations of partners, so far as they are not expressly declared, are determined by general principles which are always applicable where not clearly excluded. But in a later passage the same writer lays down a proposition which, if I may take the liberty of saying so, scarcely seems to me to be in harmony with this view. He says:—

“In framing articles of partnership it should always
“be remembered that they are intended for the guidance
“of persons who are not lawyers; and that it is, there-
“fore, unwise to insert only such provisions as are
“necessary to exclude the application of rules which
“apply where nothing to the contrary is said. The
“articles should be so drawn as to be a code of directions
“to which the partners may refer as a guide in all their
“transactions, and upon which they may settle among
“themselves differences which may arise without having
“recourse to courts of justice.”

I am not able to reconcile this with the earlier statement that partnership articles are not intended to define all the rights and obligations of the partners, because if they are so framed as to be a guide in all the partnership transactions, I hardly see what rights and obligations they would fail to embrace. But we need not concern ourselves with straw-splitting; and the question to which I really wish to draw your attention is, whether the task of preparing partnership articles should be approached by you and me from the point of view of inserting in them not only provisions applicable to the particular circumstances, but also provisions of a general kind, importing into the document nothing which would not without them be implied by law.

I have already shown you that Lord Justice Lindley answers this question upon the whole in the affirmative, and in doing so he confirms the opinion of a much earlier writer—Mr. Jarman—who said, fifty years ago,

in a dissertation upon articles of partnership (*h*), that many of the clauses usually inserted in them did no more than express the obligations legally incident to the partnership relation, but were not on that account wholly useless, as they drew the attention of the parties to the duties which they contracted in becoming partners, and, therefore, were calculated to prevent misunderstanding.

I should feel even greater hesitation than I do in dissenting from such high authorities as I have cited, if it were not for a strong conviction on my part that upon such matters as these counsel, however learned in the law, cannot be considered to be the best judges. Between them and the ultimate client, the solicitor is always interposed—their connection with partnership articles begins and ends within the walls of their chambers or of a court of law—and it is not possible for them to see the practical working of partnership matters, or to appreciate the views of the lay client in the same way as the solicitor with whom he comes into direct confidential intercourse.

While, however, I feel at liberty to express my own opinion on this subject, as I am about to do, I would impress upon you that it is only my own opinion; and that I cannot pretend to say how far it would be in accordance with the general voice of our own branch of the profession.

I do not myself think that any sufficient object is gained, generally speaking, by inserting in partnership articles provisions which are implied by the general law. My experience is that men of business like to have their arrangements expressed in the shortest practicable quantity of words, and that most of the ordinary precedents of partnership articles contain a deal of matter which may very well be omitted.

(*h*) Jarman & Bythewood's Precedents, Vol. VII. p. 30.

Let me illustrate what I mean by one of the commonest of common form provisions—a clause which solemnly declares that A., B. and C., who are entering into partnership, shall be true and just to each other in all their dealings.

Can it seriously be contended that in order to be quite sure whether he ought to be true and just to his partner a man should have to unlock his safe and examine his partnership articles? Surely the ten commandments or the church catechism would supply the desired information!

This is perhaps the most extreme of the class of provisions of which I am speaking, but to all of them alike the observation, as I think, applies, that it is a fallacy to regard partnership articles as being practically a code of constant reference. I believe that in ninety-nine cases out of a hundred a man does not look at his partnership articles from one year's end to another, unless the occasion arises for doing so upon some point connected with the special provisions, which apply to his particular partnership as distinguished from partnerships generally. Depend upon it, too, that when the time has arrived at which a partner can have any reason to learn such matters as that he ought to be just and true, and ought not without his partner's concurrence to draw or accept a bill in the firm's name otherwise than in the ordinary course of business and for the benefit of the firm—depend upon it, I say, that in such a case the relations of the partners and the interests of the firm will have fallen into dangers from which all the partnership articles in the world would afford but the slenderest protection.

Draftsman's
true aim
suggested.

To my mind, therefore, your aim as draftsmen should be to express a consistent scheme of partnership, based upon the wishes and intentions of the parties, and providing as far as may be for the contingencies which may arise, and to avoid for the most part super-adding

to the document the mere expression of what are well settled principles of general law.

With that observation I exhaust what I have to say upon partnership articles from a purely general point of view, and conclude my first Lecture. I shall ask you in my next Lecture to turn your attention to the task of dissection, and travel with me over the most important points which arise upon the different clauses of such an instrument.

SECOND LECTURE.



PARTNERSHIP
ARTICLES.
(continued.)

{ LENGTH OF TERM.
RETIREMENT OF PARTNER.
NATURE OF BUSINESS.
PERSONAL STATUS.
MONETARY ARRANGEMENTS.
ACCOUNTS.
DISSOLUTION AND ITS CONSEQUENCES.
GOOD-WILL.
{ ARBITRATION CLAUSE.

SECOND LECTURE.



As indicated in my last Lecture, I propose now to direct your attention more in detail to the most important points upon which your minds should be clear when you have to discharge the duty of preparing or perusing partnership articles.

Subject of
Lecture.

It is manifest that first of all you would require to know the date of commencement and proposed length of the partnership term, and the circumstances, if any, on which, and terms upon which, any partner is to have the power reserved to him to retire from it.

First points
for draftsman.

All these terms, of course, may be arranged before you are consulted, but many people who agree to go into partnership together walk off to a solicitor and ask him to prepare articles as if he sold them over the counter like boots, and in such a case you will, of course, have to point out the various matters which should be specified in the agreement and the considerations which bear upon them.

Now, as to the date of commencement, you will readily see that in the case of an entirely new partnership it will generally not be very material what date the parties fix upon so long as they do settle some date. But in the case of the admission of a fresh partner into an existing firm, it is important to see that the date of commencement fits in consistently with the other provisions of the articles, as to the interest of the new partner in pending contracts and so forth.

Date of com-
mencement.

The length of the partnership term is eminently a matter for the parties interested to agree upon for

Length of
term.

themselves; but if you are asked to express an opinion upon it, you may, I think, bear in mind as a sound axiom that very short and very long terms are both, in ordinary cases, undesirable. The former do not allow of the establishment of that settled feeling which is so essential to true partnership relations—the partners are apt to be constantly thinking to themselves what next, and what next. Against very long terms it may be forcibly urged that they discount the future too much. Circumstances may alter in a hundred ways not possible to be foreseen, which, while they will not in law serve as ground for dissolution, may cause a man to lastingly regret having formed a permanent tie from which he cannot escape. Ten years is, I think, a term which should rarely be exceeded. The point to impress on your clients is generally, I suggest, this—if you all want to go on you can always agree to do so; if any one of you does not, it will in most cases be much better for all of you that you should be apart.

Right of
retirement.

The reservation to any of the partners of a right to retire, and the terms upon which they may do so, is a matter for consideration according to the circumstances. If the parties do not themselves originate such a term, it would certainly not be for you to suggest it in a case in which they stand on anything like equal terms in point of age and in other respects. But if a man of sixty is taking to himself a partner of twenty-four, the laws of nature will suggest plainly enough that at no distant date the senior partner may desire to take his rest, and leave the heat and burden of the day to be borne by younger shoulders; and that he will be acting unwisely if he pledges himself to continue for a definite term of years personally and actively to carry on business. In such a case it will be matter for careful consideration upon what terms he is to be at liberty to retire, and these terms will of course vary according to the nature of the business and the several interests of

the partners. If, for instance, the partner to whom it is proposed to give the right has a large capital embarked, and the character of the business is such that it cannot be speedily realized without annihilating the business as a going concern, it would manifestly be unjust to the younger partner that the senior partner should be placed in a position to say, "I give you notice that I am going to retire next Monday, and that the assets of the firm must be realized forthwith to pay me out." Again, it may be that the senior partner has a son whom he wishes to bring forward, and that he may desire to secure the right to retire in his favour, and may be in a position fairly to impose this term.

Perhaps the most extreme form which the right of retirement can take is that which gives to a partner a right to sell his share without even imposing any condition upon the mode of exercising the right. How any sane person can consent to be a party to an agreement conferring such a power on his partner, is a mystery which I will not pretend to solve, but the power is given sometimes, though not, I need hardly say, in partnerships which involve skilled personal attention on the part of all the partners. Another and much more rational arrangement, which not unfrequently accompanies the provision for right of retirement, is that the other partner shall have an option of purchasing the share of the retiring partner.

The goodwill of the business is an element which also arises in connection with the retirement of a partner; but I will only ask you to make a mental reservation of the fact here, as I propose to deal with that important subject separately.

Having satisfied yourself when the partnership is to date from, how long it is to last, and in what, if any, *foreseen* contingencies, and on what terms it may be dissolved—I lay stress on the word "*foreseen*" as, of course, a partnership may be brought to dissolution

Nature of the
business.

by a thousand unforeseen contingencies which the partnership articles do not provide against—when you have reached this point, the next matter to claim your attention will be the nature of the business, and a very important matter it is.

All of you probably are aware that, in the case of joint stock companies formed under the Limited Liability Acts, the objects of the company—the precise purposes for which it is formed—are required to be specified in the memorandum of association, and that by no possible means can the company afterwards lawfully alter or deviate from those objects, although they may by special resolution change the regulations embodied in their articles of association as much and as often as they please. If any single act is done which does not fall within the four corners of the objects specified in the memorandum, any shareholder—even though he holds only one £5 share out of a capital of £1,000,000—may come to the Court to stop it, by injunction, as being *ultra vires*.

The particular statute law relating to companies has no application to the case of private partnerships which we are considering; on the contrary, the objects of a private partnership may by mutual agreement be altered at any moment to any extent; but I have referred to it as forcibly illustrating the abstract proposition—agreeable equally to law and common sense—that partnership is an artificial relation created for a particular purpose, and that it is a violation of the contract for any partner by his acts to extend its limits beyond those which the contracting parties have agreed upon. It is a necessary deduction from this proposition that the objects of a partnership should be accurately defined, so that the partners may, to use a homely phrase, know where they are—may have before their eyes broadly defined metes and bounds within which their transactions are to be confined. I shall hope to convince you

of the importance of this, both as an internal matter and in its bearing upon the relations of a firm to the outside world.

Now there are some classes of partnership in which an accurate definition of the purpose for which they are formed does not give rise to any difficulty. If two surgeons, for instance, were to enter into partnership it would be a very extraordinary circumstance if they had any object in view but to carry on jointly the occupation of surgery; and the same observation applies to professional partnerships generally, and to some strongly individualised occupations and trades. But when we come to commercial partnerships it is a very different story. Take, for instance, the case of merchants. In olden days a merchant was a merchant. He bought goods from A., and he sold them afterwards to B., C. and D., and the difference between the price at which he bought and that at which he sold represented his revenue. But the times have changed, and the telegraph wire, enormously increased competition, and many other circumstances, have dislodged the merchant from his original position and driven him to make money in the best way he can, which is not always a very safe way. He will embark his capital in ventures differing from each other as widely as the poles; he will become a member of a syndicate, a director of a company, all sorts of things at one and the same time. Only a little while ago I was speaking to a member of a firm which has been connected specially with a particular Indian trade for any number of years, and he mentioned in the most incidental manner that he and his partners were working a colliery in Wales. Fifty years ago the then representatives of the same firm would as soon have thought of coming out as conjurors.

I do not bring this before you for moralising purposes, but because it has a direct bearing upon my

subject, though it may seem at first blush to be far removed from it. A client comes to you and asks you to prepare partnership articles for himself and Mr. Smith, with whom he is going into business as a merchant. How will you define the nature of the business? Will you use the general term "merchant" without inquiry, restriction, or qualification, or will you point out that it may in these days mean almost anything on the wide earth, and—here comes the lawyer's point—that your client's partner will be in a position to pledge the firm's credit to third persons with much greater facility if he is unfettered by any restrictive definitions of the limits within which the partnership ventures are to be confined than where some attempt at least is made to specify them with reasonable particularity. Do not misunderstand what I mean. It is true to the full extent that the internal regulations of partners have nothing to do with the outside world in the absence of express notice; but in saying that the mode in which the objects of the partnership are defined in the articles may affect the degree of facility with which the firm's credit may be pledged, I mean this—that where a defined and settled course of trading is established and publicly known, a sudden deviation from it by one partner will not be easy of accomplishment, and a man may be deterred from even contemplating a rash or unauthorized venture in the firm's name, whereas if the objects of the partnership have no limitation, each member of the firm may feel practically at liberty to do his own sweet will, and commit the firm to the result of his construction of such a loose term as "merchant."

All general rules are subject to exceptions, but I think that you may lay to heart as a sound rule that, in the interests of all the partners alike, the nature of their partnership business should be clearly understood by them, and be impressed, not too narrowly, but with as

much precision as the circumstances will permit, upon the articles, and more especially so in the case of a trading partnership.

I will only add upon this point that, as a dry matter of draftsmanship, a clear perception at starting of the objects of the partnership will greatly assist you in the preparation of many of the incidental provisions of the agreement.

We will take it that you clearly understand what manner of business it is that is to be carried on in partnership. The next step would I think naturally be the consideration of whether any special provisions are to be inserted in connection with the personal status and acts of each partner. It may be that a man of mature judgment and possessed of large capital is taking to himself as partner a young man just starting in life, or a clerk who has faithfully served the business for many years. In such a case the senior partner would naturally be in a position generally to dictate his own terms, and, acting for him, you may be called upon to suggest restrictive stipulations for his protection. Such stipulations sometimes, though not I think wisely or justly, go the extreme length of giving the senior partner absolute power to dissolve the partnership, without rhyme or reason, at will, and stopping short of that they may take a variety of forms, depending of course largely on all the circumstances of the case. Thus a junior partner may be precluded from drawing or accepting bills in the firm's name, or from signing cheques. Or again, it may be provided that the senior member of the firm shall devote to the business as much or as little time as he pleases, and is to be at liberty to engage in other partnerships or business ventures, while the junior partner is always to be tied exclusively to this particular partnership, and devote all his time and energy to it. In so far as such matters as these are remitted to your judgment, I would impress

Personal
status and
acts of part-
ners.

upon you that you should be guided only by the extent of the powers which the position of your client gives him to dictate restrictive terms, though of course that must be a considerable element. The power where it exists may generally be exercised wisely with moderation, and even with generosity, and the true point to aim at is that which is right and just, having regard to all the circumstances.

Monetary
provisions.

The monetary part of the arrangement may next, I think, claim your attention, but although this is generally perhaps the most difficult and responsible part of the draftsman's task, the difficulty here lies perhaps not so much in originating the scheme as in giving effect to the intention of the parties, because, however crude may be the ideas of your clients as to many of the terms by which their partnership is to be regulated, they will generally have a tolerably definite notion, before they come to you, as to the amount of capital which each of them is going to embark, the proportions in which profits and losses are to be shared, and the allowances, if any, which they are going to draw for subsistence at stated intervals in anticipation of the taking of their accounts.

I have already drawn your attention to some of the points which arise, where the partnership is formed in connection with an existing business, as to the mode of dealing with the assets of the old firm for purposes of capital, and the adjustment of the profits and losses of pending transactions as between the members of the old and new partnerships, and I need hardly say perhaps that it is not by any means easy to give expression to what is desired to be the arrangement on this head. But there is one observation—very self-evident, but very often overlooked in practice both by draftsmen who are over eager and draftsmen who are careless—which applies to all complicated provisions alike. If you thoroughly understand what is wanted

you will never find it insuperably difficult to express it accurately; but if you do not understand what is wanted the art of draftsmanship will most certainly not supply the deficiency for you. Do not, therefore, attempt to pen a clause or to instruct counsel to do so without knowing what meaning the clause is wanted to convey.

With regard to the capital and the profits and losses of a partnership business there are some few fundamental axioms which I may usefully mention.

In the first place, there is no necessary connection at all between the proportions of capital and those of profit and loss. It may be that although I bring into a partnership business £5,000, and my partner only £1,000, it will be perfectly just and fair that we should agree to share profits and losses equally. He may, for instance, be the inventor of a patent which we are going to work, or he may have some other special form of knowledge indispensable for the partnership business that I do not possess, or it may have been agreed that I am to play a great deal and he is to work a great deal; all sorts of reasons may operate as to the division of profits independently of the shares in which the capital has been contributed.

But there is a converse side to this proposition. The fact that the proportion of profits and losses has no necessary relation to that of capital, renders it desirable to separate the two things completely, and for this reason a contribution of capital should always be regarded as a debt due from the firm collectively to the individual who has brought it in. If I bring in, as I just supposed, £5,000 of capital, it may at any given time during the partnership be represented by the value of plant, of business premises, of patents, of goods, of ships, of anything—and of course there is always a melancholy possibility, if the firm's venture does not succeed, that it may come to be represented by a round O. But from start to finish, and however irre-

Capital
distinct from
profit and
loss.

Capital is
debt due from
firm.

vocably it may be merged in the business while the partnership lasts, and however much it may be subjected to the risk of being lost, it must and will, as between the firm and myself, be a debt due to me.

Interest on
capital.

It follows from this that the share of capital contributed by each partner, and any additions to it which he may make during the partnership term with the consent of his partner should, unless in very exceptional cases, carry interest, and that this interest should be payable as an outgoing, and in priority to any division of profits. Of course if—the capital being contributed equally—the interest on capital and the profits are in fact divisible in the same proportions, it makes no difference in fact whether the interest is paid as interest or is treated as profits, but in all other cases it is not only a matter of principle but an actual money question, and it stands to reason that a partner who brings in £10,000 as capital should have some return for his money as against a partner who contributes perhaps a tenth of that figure.

Another rule is, that capital should always in partnership articles have a cash denomination, as otherwise there will obviously be no means of accurately ascertaining afterwards the amount of capital which each partner was taken to have contributed. The capital of one or more of the partners may be represented wholly or partly by buildings or plant, or outstanding debts, or anything else, existing at the commencement of the partnership as may be arranged, but in that case a money valuation should always be taken, and a figure put upon them which is to be taken to be their equivalent as between the partners.

Accounts.

In close connection with the subject which we have just been considering is that of the provision which should be made by the articles as to the partnership accounts. I am sorry to say that, although this is a matter of paramount importance, experience shows that

the terms of partnership articles in this respect are very often not adhered to from sheer carelessness. As long as all goes well, and the partners are on good terms with each other, they do not trouble their heads about settled accounts; but a very different song is sung if they fall out and discover that they have put it in each other's power to rip up all sorts of questions of account which might have been easily set at rest and concluded.

However that may be, there is no possible question that no partnership agreement can be considered to be complete which does not provide intelligibly for the settling of the partnership accounts at stated intervals in such a way as to preclude them from being re-opened, except for some manifest error discovered within a given time; and it is desirable that these provisions should go the length of making the balance-sheets binding after a specified time, even without being signed (unless of course where the non-signing is due to a dispute), so that the mere accidental, or the secretly intentional omission to sign shall not allow a partner to escape from a document to which he has had ample opportunity to object. I must not, however, omit to add that in this, as in other cases, the doctrines of equity are more powerful than the language of contracting parties; and no matter how strong may be the language used, a partnership account will not be conclusive upon a partner who has been induced to sign it by fraudulent representations, or by a dishonourable concealment of facts, amounting virtually to the same thing (*a*).

I need hardly, perhaps, say that it does not require an express provision in partnership articles to entitle a partner to have accurate accounts kept and to have free access to them. That is his clear and indisputable right. But there is no general principle of law which entitles a partner to require to have the partnership accounts actually and conclusively settled at any given

(*a*) Lindley on Partnership, 4th edit. p. 839.

intervals of time during the partnership, and it is in this respect that express provisions are most desirable in the interests of all parties.

I cannot better or more concisely sum up this matter than by quoting a short passage from Lindley on Partnership (*b*) :—

“ The object of taking partnership accounts is two-fold, viz. : (1) to show how the firm stands as regards strangers, and (2) to show how each partner stands towards the firm. The accounts, therefore, which the articles should require to be taken, should be such as will accomplish this two-fold object. The articles should consequently provide not only for the keeping of proper books of account and for the due entry therein of all receipts and payments,”—I break off there to remind you that so far the provision would only be declaratory of the general law—“but also for the making up yearly of a general account showing the then assets and liabilities of the firm and what is due to each partner in respect of his capital and share of profits, or what is due from him to the firm as the case may be.”

As to dissolution of partnership.

Having now treated of the main features of a partnership scheme, in so far as they relate to what is to happen while the partnership is in existence, I propose to direct your attention to the very important subject of those provisions of a partnership agreement which relate to its termination, and in this connection I will deal also with the subject of goodwill, because it is naturally connected, for practical purposes, with the termination of a partnership.

The order in which my present subject presents itself will naturally be :—

- (1) In what events is the partnership to terminate ?
- (2) What is to happen when it does terminate ?

As to the events which may bring a partnership to an end, before its termination by effluxion of time, there are some which will *ipso facto* have that effect without being specified in the partnership articles; and others which will serve as a ground for asking the Court, in the exercise of its equitable jurisdiction, to dissolve the partnership, without their being mentioned in the articles, but which may be made by express stipulation *ipso facto* grounds for dissolution; and others again, which would not be recognized by the Court in the absence of express agreement, may by stipulation serve to bring a partnership to an end.

What events may involve dissolution.

Of these three classes of events the first would appear to embrace the following:—

Events *ipso facto* dissolving partnership.

- (1) The taking of a partner's share in execution under a *f. fa.* (c);
- (2) The transfer of a partner's share by bankruptcy (d);
- (3) The occurrence of some event which renders the continuance of the partnership illegal (e); or
- (4) The death of a partner (f).

To this list would have been added formerly the marriage of a female partner, upon the ground that the effect of that event would otherwise be to introduce her husband into the firm without the consent of her co-partners (g). But I apprehend that since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), this legal consequence of marriage, which would formerly have been the alternative of a dissolution, has vanished, and with it the ground upon which marriage was held to be an *ipso facto* dissolution of a partnership. Whether in the case of a partnership involving the personal

(c) Lindley on Partnership, 4th edit. p. 230.

(d) *Ibid.* p. 230.

(e) *Ibid.* p. 232.

(f) *Ibid.* p. 231.

(g) Smith's Mercantile Law, 8th edit. p. 26.

services of a female partner, the rival claims to her time and attention, which might reasonably be supposed to arise as a necessary consequence of her marriage, could be successfully urged as a ground for asking the Court to dissolve the partnership on the happening of that event—so as in fact to bring the marriage within the second class of events which I am about to mention—is a somewhat interesting subject for speculation.

To all the causes of *ipso facto* dissolution which I have enumerated, except the third (viz., the occurrence of an event rendering the continuance of the partnership illegal), are appended in Lord Justice Lindley's book on Partnership (*h*), the qualifying words "in the absence of an express agreement to the contrary;" and you will find substantially the same qualification in Smith's Mercantile Law (*i*). It would be the height of presumption on my part to fly in the face of such authorities, and my view may be quite a mistaken one; but I must confess that it scarcely seems to my mind accurate to say that these events will dissolve a partnership only in the absence of express agreement to the contrary. No doubt the effect of such an agreement may be produced substantially, because if six people agree that if one of them dies or becomes bankrupt the other five will go on in partnership; or, again, if it is agreed that in the event of A.'s death his son shall succeed to his share of the business, the term will be a perfectly good one, subject in the latter case to the option which A.'s son clearly has to decline to come into the business. But it would appear to me that in either case equally the partnership is not the same, but a new one, and that the death of a partner must, strictly speaking, bring a partnership to an end, as surely as it does the life which was an integral part of it, although by the provisions which have been

(*h*) 4th edit. p. 230.

(*i*) 8th edit. p. 26.

made some at least of the ordinary results of a dissolution will have been avoided and a new partnership created.

Of the events which, though they will induce the Court's interference, do not *ipso facto* bring about a dissolution, but may be made to do so by express stipulation, I would point out that it is a very delicate matter to frame a clause which will convert into an actual dissolution that which is, in law, only a ground that may be urged to the Court as a reason for granting one.

Take, for instance, the three recognised equitable grounds of confirmed insanity, misconduct, and the hopeless state of the partnership business, and let us suppose it to be declared by partnership articles as to any one of them that it shall *ipso facto* bring a dissolution to pass. Is one partner, who may have a hundred personal reasons of self-interest for terminating the partnership, likely to be in all cases an impartial judge of another partner's sanity, or his conduct, or of the condition of the partnership business? Unless in the clearest possible circumstances it may safely be assumed that the result of acting on such a clause would, in many cases, be precisely the converse sort of suit to that which might come to pass where no such provision was contained in the articles, that is to say, a suit, not to bring about but to upset the dissolution. I may, however, add with reference to the particular ground of insanity or mental incapacity, that a clause providing that if a partner is totally unable for some specified period to attend to his duties, the partnership shall terminate, is, I think, less open to objection than any other provision designed to produce the same result.

Grounds for dissolution operating as *ipso facto* dissolution where agreed.

The third class of events springs entirely from the exercise of the freedom allowed by law to contracting parties. If they so agree in their articles, a partnership, otherwise for a definite term of years, may be terminated

Events specially stipulated to dissolve partnership.

by one partner on his giving a week's notice, or by his taking advantage of a stipulated right of retirement, or in almost any event, reasonable or unreasonable, that may be agreed upon. If you have to prepare a clause fraught with such importance, you must take heed to your ways that you express it in clear and accurate language, and if the stipulated event is itself obscure or uncertain, and so liable to give rise to dispute and difficulty when it is acted on, you will fall short in the performance of the duties which you owe to your client if you do not draw his attention to the objections to which it is open, and use your influence in the direction of having it either put upon a better footing, or, if that be not possible, abandoned. You will find as you journey along the road that there are a great many people who want to provide, in partnership and other agreements, for all sorts of things which are much better left to the hidden future; and a great many other people who think it a great nuisance to provide for anything at all, and look on law, lawyers, and legal documents as a compound fiction got up for the benefit of a particular class of the community. The former you must restrain within the limits of plain common sense; and the latter you will have to protect against their own folly as far as you have the opportunity of doing so. Let me counsel you to bear steadily in mind that in the case of partnership agreements there are many things which experience has shown it to be wise to provide for, as bearing upon certain or reasonably probable events, and many other things which are far better left alone. If you master first the broad principles of law which bear upon the subject of partnership, and then apply yourselves in a large-minded spirit to the circumstances of the particular case, I am persuaded that you will have no very great difficulty in determining under which of these heads any proposed provision falls. And to this advice I would

Provisions for
contingencies
—how far
desirable.

add one observation which I make with diffidence, because it involves the expression of a difference of opinion between myself and several learned writers of precedents and drafts, that I think there is a tendency in most of the books of precedents, and in the drafts which come out of chambers in Lincoln's Inn, to over-elaborate partnership articles, not only in the way which I have already referred to in my first Lecture of expressing what the law implies, but also of over-much provision for remote contingencies. I remember a friend of mine, a very able solicitor who has acquired great experience in the formation of mercantile partnerships, telling me that, having to prepare a set of partnership articles, and being at the time much pressed, he sent instructions to a conveyancer to prepare the draft. When it came back it happened that a fair copy was sent to the client without my friend seeing it, and the result was that a few days afterwards in came the client—an acute, clear-headed man of business—and he plumped on to my friend's table a stupendously long draft, and said, "For goodness' sake tell me what this is all about. For two mortal evenings I have been sitting over it till my head has ached, and I can't understand a word more of it now than when I began, and shall never live to get to the end." That draft died very young, and was replaced by another of about a third of its length. It is my conviction that I am not misleading you when I say that while partnership articles do not admit generally of being very brief, they are often inordinately and unnecessarily long, and that you will do well to bear this in mind for personal guidance.

So much as to the extent to which the events by which a partnership may be terminated have to do with the provisions of partnership articles. Let us now consider the consequences of dissolution.

Consequences
of dissolution.

The most convenient mode of doing so will, I think,

be for me to point out to you as to each of the matters to which I am going to draw your attention on this head, first, how the law stands in the absence of express agreement, and secondly, in what respect it may be desirable to modify it by stipulation. I ought, however, to say by way of preface, that in the largest sense the branch on which we are now entering is, like most other branches of partnership law, of a two-fold character. To exhaust the subject, the consequences of dissolution would have to be considered both in their effect upon the relations of the firm with third persons, and also as between the partners themselves. In so far, however, as these consequences concern third persons, they do not closely touch the subject of partnership articles, because of the general principle of law which I have already mentioned, that the rights of third persons are not affected by the provisions of partnership articles, and I therefore purposely exclude that aspect of them from our consideration.

The general law on this subject.

The first and foremost legal consequence of dissolution is that each partner is entitled to require that the whole of the partnership assets shall be realised *by sale*, the debts paid, and the surplus divided (*j*). I lay stress on the word “sale” because it is the essence of this right. It is not competent in law for any surviving partner, or the representatives of a deceased partner, to substitute for realisation by sale a scheme of valuation or of division in specie, unless, of course, where all parties consent. This absolute right is subject, however, to the qualification that the Court will not allow it to be exercised in such a way as unduly to injure any of the parties interested. For example, where a decree is made for a sale, an enquiry is frequently directed as to the best mode and time for it, and if it appears that an immediate sale will not be for the benefit of all parties,

(*j*) Lindley on Partnership, 4th edit. pp. 1015, 1040.

the Court will, in a proper case, direct that the business shall be carried on, but only for winding-up purposes, by a manager (*k*).

Another incident of dissolution which I may conveniently link with that which I have just mentioned is this—that the right to wind-up the affairs of a partnership is a right personal to the members of the late firm; whence it follows, that neither the executors of a deceased partner nor the trustee of a bankrupt partner will be permitted to take any share in the management of the affairs of the partnership (*l*).

Now I think it may be said generally that these rules of law, applicable in the absence of agreement to dissolution, do not commend themselves as being appropriate in actual fact, and that it is, in the large majority of cases, a misfortune to all or some of the members of a firm when they are remitted on dissolution to the legal consequences of that event. In saying that, I do not mean to convey that I have any quarrel with the law as it stands. On the contrary, I hardly see what other principles could be applied where the Court has nothing in the shape of bargain to guide it. Partnership is eminently a matter of arrangement, and if those who enter into it do not take the trouble to think out the reasonably probable contingencies which lie before them and provide accordingly, they can hardly complain afterwards if the Court applies a somewhat drastic method of winding up their affairs.

Application
of general
law usually
inconvenient.

Let me illustrate by the case of the death of a partner how these legal consequences of dissolution are liable to produce inconvenience and loss.

As a rule, when two or more people enter into partnership, it is contemplated that if one of them dies the survivor or survivors will continue to carry on business,

To the
survivor.

(*k*) Lindley on Partnership, 4th edit. p. 1017.

(*l*) *Ibid.*, p. 1041.

and of course the observation applies with special force to the case of a firm containing more than two partners. But if their partnership articles do not contain provisions to meet the case, the death of a member of the firm will bring the whole concern to an end. Not only may the whole of the firm's assets have to be realised, but the surviving partners, if there be more than one, will, as between themselves, have no longer any legal tie to bind them together. Of course there is no legal principle to prevent the surviving partners from making an arrangement, if they can, with the representatives of the deceased partner, which will obviate the necessity for a sale, but, on the other hand, neither is there any legal principle to compel the representatives of the deceased partner to assent to any such arrangement. Again, there is nothing to prevent the surviving partners from making a fresh partnership agreement, but even if they can come to terms in that respect they may be terribly hampered if they are not able to make satisfactory arrangements with the representatives of their deceased partner, so as to obviate a winding-up of the partnership affairs by the only mode which, in the absence of agreement, the Court can recognise.

To the representatives of deceased partner.

So much for the surviving partner or partners. But the position of the representatives of a deceased partner is by no means in all cases an enviable one. Their only alternative to insisting on the strict legal mode of winding-up the partnership is to make an arrangement which, if they represent any parties not *sui juris*, may involve them in considerable responsibility. Suppose, for instance, in the case of a trading partnership, they agree that instead of having the assets realised as soon as may be, and their testator's capital and so forth paid out, they will accept payment of his share from the surviving partners by instalments at stated intervals, and before the payments are all made the surviving

partners fail. In such a case, if the deceased partner's representatives have acted with reasonable prudence and entire *bona fides*, and have not exceeded the powers given by their testator's will, they may escape any personal consequences; but you will readily see that they might be put upon their defence and have their conduct subjected to searching investigation in the interests of beneficiaries. Again, let us assume that for some reason no arrangement of this sort is made, and the partnership affairs are to be liquidated upon the principles recognised by the Court. I mentioned to you just now, as being one of those principles, that the winding-up of a partnership is a right personal to the surviving partners, who cannot be controlled by the representatives of a deceased partner. In the exercise of this right the surviving partners may act wisely or unwisely, honourably or dishonourably. They may postpone for various reasons or pretexts the realisation of the partnership assets—they may, in the mistaken belief, or on the colourable pretence that the business may be best disposed of as a going concern, carry it on, ostensibly, at all events, only for winding-up purposes, at ruinous loss, and involve the estate of their deceased partner in that loss. It is quite true that the deceased partner's executors, if they see that the winding-up is not progressing satisfactorily, may come to the Court for relief. But although the observation of the late Mr. Joshua Williams concerning the Court of Chancery that the remedy was apt to be worse than the disease would hardly, perhaps, hold good in these days of cheaper and speedier process, yet no one can pretend to say that a suit for the winding-up of a partnership is a matter for unalloyed gratification to the parties interested, however agreeable it may be to the feelings and pockets of their solicitors; and we may take it that in the case which I am supposing the representatives of the deceased partner would hesitate before invoking

the remedy, and would be much harassed between their responsibility for winding-up to the best advantage their own testator's estate and their disinclination to be involved in litigation with his surviving partners.

I have, I think, now paved the way sufficiently to enable you to appreciate my meaning when I impress upon you the wisdom of pointing out to a client who comes to you to prepare partnership articles, that the instrument should, generally speaking, take into account and provide for the consequences of dissolution.

Express provisions as to consequences of dissolution.

As to the manner of this provision, I am compelled to fall back once more upon an observation which I have made several times already—it must depend upon the particular circumstances. The nature of the business may be such that the outstanding debts can readily be got in, or it may be such that, in the ordinary course of things, it will take a long time to recover them. The principal or only assets may be represented by lands and buildings, by plant, by goods, by advances on mortgage or otherwise, by anything, in fact, which is capable of being the subject of ownership. Perhaps the most usual arrangement where there are several partners, is to provide for a continuance of the partnership, or, as I should prefer to call it, the creation of a fresh partnership between the surviving or continuing partners, with provisions for ascertaining by valuation, and, if necessary, arbitration, the amount due to the estate of the partner who has died, or become bankrupt, or otherwise gone out of the firm, and for payment of the amount by stated instalments. When the firm consists of only two members, there is, of course, no question of a continuing partnership, although there may be an intention to carry on the business; and it is a matter for consideration with reference to the nature of the business and all the surrounding circumstances how far, if at all, the surviving or continuing partner is to be trusted in regard to the conduct of the

winding-up and the payment out of the other partner's share.

There must, of course, be an account taken in the event of dissolution, and it is matter for arrangement and adjustment in the partnership articles whether this account is to be taken as at the death, or from the foot of the last preceding balance sheet, with an addition for any estimated profits less any sums which the deceased or out-going partner may have drawn subsequently to that date on account of profits. It is a pity to leave such matters open, because it may save much confusion and trouble to have them provided for, and they are well within the border-line which separates probable from remote contingencies. I often think that if draftsmen would give their whole attention to the consideration of what terms are really necessary and proper to put the particular partnership on a satisfactory footing, with a due but not an excessive regard for the contingencies of the unknown future, partnership articles would frequently be minus a great deal of immaterial padding and rank rubbish which have survived as common form clauses, and plus some really useful provisions not to be found in them.

Where it is intended that surviving partners, either alone or in conjunction with a son or representative of a deceased partner, shall carry on the business, the shares in which they will be interested should be carefully specified, as otherwise there may be a great risk of the arrangement breaking down; and again, in the case of the arrangement extending to the admission of a new partner, he should execute a supplemental instrument when the time has arrived at which he has the opportunity of electing to enter the firm, and he does elect to do so, in order that he may become bound by the provisions of the old articles so far as they are applicable to the new arrangement; and again, provision should be made for payment by the continuing partners of the debts of the firm in due course—that is

Where business to be carried on after dissolution.

to say, in accordance with the usual course of business—and for releasing the estate of the deceased partner from liability to any claims of the surviving partners. The engagement to pay the debts would of course, however, not bind any creditors, and would only protect the deceased partner's estate as between himself and the surviving partners.

Payment of
deceased
partner's
capital.

In adjusting arrangements for payment out of a deceased partner's capital there are two points to be prominently borne in mind, and while their application is not always easy, your task, so far as you are called upon to originate or advise upon, as well as to give effect to, such an arrangement, will, I think, be lightened by keeping them constantly before you. On the one hand, it is in most cases opposed to the consideration justly due to a surviving partner that he should be obliged to pay out instantly, or very speedily, a share of capital considerable perhaps in amount, and also perhaps sunk in partnership property not able to be realised hurriedly without great injury to the concern. On the other hand, so long as the share of the deceased partner's capital is in the business, it is necessarily at a risk—perhaps a considerable risk—without producing profits (other than some moderate interest which is usually stipulated for), and its realisation ought not, therefore, to be too long delayed.

X Goodwill.

The next subject to which I propose to draw your attention is that of goodwill, the recognition and mode of dealing with which often give rise to questions of considerable nicety in connection with the dissolution of a partnership.

It is not easy to give a satisfactory definition of goodwill, and yet it may, and in many cases unquestionably does, represent a very important element in a partnership business. It is described in Lindley on Partnership (*m*) as the term generally used to denote the benefit

arising from connection and reputation, and, in the same passage, its value is stated to be what can be got for the chance of being able to keep that connection and improve it. In Smith's Mercantile Law (*n*), it is referred to as a species of interest arising from various and often accidental circumstances, such as the situation of a house, the changes in a neighbourhood, and the prejudices of customers; and this writer adds, that where the profits of the business result almost entirely from confidence placed in the personal skill of the party employed, as in the case of surgeons or attorneys, the goodwill is too insignificant to be taken notice of. I cannot, however, assent to that proposition, put in that way, for a moment. It is a matter of common knowledge that on the death of a surgeon or solicitor, large sums are often paid to his representatives for the practice, which means nothing more or less than a purchase of the chance that the purchaser may be able to step into the shoes of the deceased practitioner, as to the patients in the one case and the clients in the other; and it is idle to say that the goodwill is in such a case too insignificant to be taken notice of. But there does attach to the case of a professional business dependent on personal skill a difficulty—in the absence of agreement—in computing the goodwill as a partnership asset, because it is difficult to get hold of anything tangible. The late Master of the Rolls was forcibly impressed with this in a case of *Arundell v. Bell* (52 L. J. R., Ch. Div. 537), in which a question of the goodwill of a solicitor's business came before the Court of Appeal; and he laid it down, as a general rule, that in the absence of express contract there is not, in a partnership between solicitors, any partnership asset which is capable of being sold or valued as the goodwill of the partnership business. Sir George Jessel's judgment in that case is very instructive, and I strongly recommend

(*n*) 8th edit. p. 193.

you to read it; but I must not omit to point out that his ruling on this head was not necessary for the decision of the particular case, and that Lords Justices Baggallay and Lindley purposely refrained from expressing any decided opinion on the point one way or the other.

General principles of law as to goodwill.

I think that the leading principles of the law as to the goodwill of a business, where there is no express agreement on the subject, may fairly be put in this way:—

First, that in the case of a mercantile business or any other business not dependent entirely on personal skill, the goodwill is clearly recognized as an asset of the partnership, and not as a right passing to the surviving or continuing members of a firm to the exclusion of a deceased or out-going partner.

Secondly, that in the case of a business dependent on personal skill, it is at least doubtful whether the goodwill can be so made available as a partnership asset; and—

Thirdly, that a goodwill where it is capable of being sold, must, on dissolution, be sold for the benefit of all the partners, if any one of them insist upon it; but—

Fourthly, that in no case is there any obligation on the part of any of the partners of a dissolved firm to retire from business, merely because the partnership is dissolved, although so far as is possible consistently with that circumstance, the Court will interfere to protect and keep intact the goodwill of a business until it is sold (o).

Practical result of foregoing propositions.

If you analyse these propositions, two things will, I think, strike you forcibly; one is that, in the absence of agreement, the goodwill of a business must in the large majority of cases be at the mercy of the surviving or continuing partners. Entitled as they are to carry on the self-same occupation on their own account, next door to the dissolved firm's business premises if they please, and possibly also (though this is not clear) in the name

(o) Lindley on Partnership, 4th edit. pp. 859—861.

of the old firm, it is manifest that a purchaser of the goodwill must have a very slender chance of gaining anything by his bargain should this formidable competition be started against him, and, indeed, that it would be hard to find a purchaser who would buy at all in such circumstances. Then another observation is this, that if the goodwill is an important asset of the dissolved firm, and represents to the surviving or continuing partners a source of considerable gain, and, in the absence of competition by them, represents also what may be a valuable subject for sale to an outside purchaser, it is only just and equitable that the deceased or out-going partner should not, as it were, have his share of this joint property abstracted from him or his representatives, as the case may be, by the exercise on the part of the surviving or continuing partners of a right to carry on the same business and do their best to appropriate the connection.

The means of avoiding such a result are not provided for by law, nor is it easy to see how they could be. But they are ready to the hands of all who enter into partnership agreements, because it is competent for the partners to make any arrangement as to goodwill that they please; and I may add most unwise of them not to do so where, as is almost invariably the case, there is any likelihood that the business will survive the dissolution of the particular partnership.

In considering the best practical mode of dealing in partnership articles with the subject of goodwill, the first point to which attention should be turned is the character of the business, the extent to which, if at all, the value of the goodwill would be dependent upon its association with the premises on which the business is carried on, and the relation which personal skill on the part of the partners may reasonably bear to other elements of prosperity. There are some businesses which represent almost the characteristics of a pro-

Considerations affecting express clauses as to goodwill.

perty to be handed down from generation to generation, from partner to partner. There are others which can only be sustained or increased by the personal qualities and skill of the partners for the time being, and others lie mid-way between the two extremes. The extent to which goodwill may fairly be made by stipulation a subject of ownership and of purchase on the dissolution of a firm would be largely dependent upon the view taken of the business from the aspect in which I am now presenting it. The more it possesses, as it were, inert properties of survival and continued existence, and the less it is and is likely to be dependent on the personal characteristics and exertions of the partners for the time being, the greater must be the value to be attached to the goodwill as a partnership asset. I in no-wise mean to detract from the personal ability of those engaged in commercial pursuits, or to suggest that they do not in many cases show conspicuous energy and talent, when I say that in so far as it is possible to mark the distinction which I am drawing with a broad line, I think it may fairly be said that the goodwill of a business is usually a more important and valuable asset in the case of a mercantile than in that of a purely professional partnership.

Writing on the subject of goodwill Lord Justice Lindley says (*p*), that it is generally valued at so many years purchase on the amount of profits, but the observation is hardly elastic enough, perhaps, to be an accurate guide to you as draftsmen, because the nature of the business and the other circumstances of each particular case can alone give the materials for judging as to what is a right and proper provision to make as to goodwill. The plan pointed out by Lord Justice Lindley is, however, at all events, one mode, and in the absence of special circumstances seems to afford as good a basis as any other upon which to work.

There is another passage in the same work which contains valuable advice to the draftsman :—

“ In framing articles of partnership too great care cannot be taken to express as clearly as possible what is intended to be done with respect to goodwill, and in order to avoid all ambiguity, the word itself should be made use of. There are cases which show that an agreement to take a retiring partner's share in the property and effects of the partnership, or in the partnership premises, do not entitle him to anything in respect of goodwill. But in another case, a clause authorising a surviving partner to take the stock of the partnership at a valuation, was held to entitle the executors of a deceased partner to a share of the value of the goodwill of the partnership, and of a trade mark belonging to it ” (g).

It is not easy for me to give you any guiding rules to go by in the particular matter of determining what the clause as to goodwill in partnership articles should contain, beyond the passages to which I have just referred, and, except in so far as I have indirectly indicated them in my observations as to the results which follow, as to goodwill, upon dissolution in the absence of special agreement. There is no magic about the matter, and it must resolve itself at last into what is fair and just to all parties. But there are two suggestions at all events which I may usefully make. The first is, that the parties should be made thoroughly to understand what their legal position will be if they omit mention of goodwill altogether, so that they may know in what respect they will be altering, by express stipulation, what would otherwise be their relative positions. For example, if they propose to adopt the expedient of having the assets and goodwill sold by some selected person, they ought to be

(g) Lindley on Partnership, 4th edit. p. 864.

aware that by such a clause each partner will be depriving himself of the right to carry on business on his own account after the dissolution. This was expressly so decided in a case of *Turner v. Major* (3 Giff. 442), where an injunction was granted to restrain one of the partners from doing so before the goodwill of the partnership had been disposed of.

The second is this. There is a growing, and on the whole I think a wise tendency to depute to arbitrators the adjustment of any question of difference as between partners, whether before or after dissolution. I have a word to say on that presently, but I introduce the subject here as leading to the observation, that in this matter of goodwill the right and proper thing to be done can generally be judged of very much better by the light of events at the end of a partnership than in anticipation of them at its commencement; and I am myself disposed to think that the best thing to do is to refer in articles of partnership to the element of goodwill with sufficient clearness, to show that in the event of dissolution it *is* to be taken into account; but instead of attempting to legislate beforehand as to the precise method in which it is to be arrived at, to leave that to be adjusted by arbitration, if, and of course only if, the parties concerned cannot come to a satisfactory arrangement without the intervention of third persons.

I must not leave this subject without saying a very few words as to two important elements of goodwill—the right of user of the trade name of the dissolved firm, and of any trade marks attaching to its business.

Both of these matters may be of the utmost importance in the computation of the value of goodwill. As to the first, several of the authorities are referred to in Lindley on Partnership (*r*), but I must humbly confess that a perusal of the cases left me very little wiser

Trade name.

than it found me, and that I cannot pretend to have formed, and will not, therefore, attempt to express any confident opinion as to whether on a dissolution of partnership a partner is entitled to continue the old business in the old name for his own benefit. Lord Justice Lindley bases upon the fact that a purchaser of a goodwill is undoubtedly entitled to represent himself as the successor of those who carried on the business, and to prevent anyone else from doing so, the argument that a continuing partner ought not to be able to acquire that same right for nothing as against an outgoing partner, or the representatives of a deceased partner; and although this view is not altogether in harmony with the authorities, I cannot but venture to think that it is the sound one, and would prevail if the matter were now to be judicially decided. In any event I am sure that this is a matter which may be best dealt with and set at rest, once for all, by the partnership articles.

As to trade marks you will all be aware, from your own personal observation, of the fact that they may possess great value, because you will have seen what immense sums are spent in advertising goods in special connection with them, and what immense pains Mr. A. will frequently take to imitate Mr. B.'s trade mark as closely as possible without actually bringing himself within the meshes of an injunction, and how valiantly Mr. B. is apt to resent any trespasses on his trade mark domain. It is well settled that a trade mark is as much an asset of the firm as anything else, and any provisions in the partnership articles as to goodwill should, in an appropriate case, declare, as to any trade marks which may at the time of dissolution belong to the firm, how they are to be dealt with. Trade marks.

I have already mentioned that the goodwill of a business is often very closely identified with the particular premises on which the partnership business is The partnership premises.

carried on. So much is this the case, that in a great many trades the goodwill, without possession of the identical premises, is for all practical purposes valueless. From this it follows that the mode in which the partnership premises are to be dealt with on dissolution should not be lost sight of, and if it is contemplated that the business will be carried on after dissolution, the provisions on this head should secure to the surviving or continuing partners the right to retain the premises in connection with the goodwill upon the terms of making proper stipulated compensation to the outgoing partner, or the estate of a deceased partner, in respect of their acquisition of his interest in both.

Arbitration
clause.

I turn now to the last subject on which my limits will permit me to dwell—that of an arbitration clause in a partnership agreement.

It has, as I indicated just now, become more and more the custom, in modern times, to insert in partnership articles a clause of which the effect is to substitute a tribunal of private arbitration in place of recourse to the Court for the adjustment of differences.

Why desir-
able.

The relations between partners are from the nature of things so complicated, and they assume such varying phases from causes altogether outside the possibilities of calculation or anticipation when partnership articles are framed, that experience shows it to be beyond human ingenuity to provide for all contingencies. It follows that matters often arise, both during the continuance of a partnership and upon its dissolution, for the adjustment of which there is no charter, and that if the good sense and mutual forbearance of the persons interested can find no other solution, there is nothing for it but the interposition of the Court or of private arbitrators. As a rule it is recognized to be much wiser, in the interests of all parties, that partnership dirty linen should be washed as quietly and unobtrusively as possible, and hence it is that arbitration clauses have steadily

grown in favour, and that it is the rule and not the exception to find such a clause in a partnership agreement.

In former times these arbitration clauses, whether in partnership articles or other instruments, though not actually looked upon with avowed disfavour by the Court, received but a very faint measure of approval. The specific performance of such a provision could not be enforced in equity, nor could damages for the breach of it be recovered at law, nor could it be pleaded in bar either at law or in equity ; and the utmost extent to which the Courts were disposed to recognize it was this—that the conduct of a party who insisted on seeking the Court's aid without first attempting to obtain redress under an arbitration clause did not commend itself (s). In one case of *Waters v. Taylor* (15 Ves. 10), Lord Eldon went the length of refusing to appoint a receiver and manager of the Italian Opera House upon an interlocutory motion, on the ground that there were special provisions for referring to arbitration the particular matter in dispute ; and in delivering judgment he made these observations, which illustrate exactly how the law then stood on this subject :—

How regarded
by the Court
formerly.

“ As a general proposition, it is true that an agree-
“ ment to refer disputes to arbitration will not bind the
“ parties even to submit to arbitration before they come
“ into Court. I would not, therefore, say that the conse-
“ quence of this provision in the instrument is that a
“ suit cannot be instituted, without adding this quali-
“ fication, that the Court, if bound to administer relief,
“ is fully justified in pausing before it takes upon an in-
“ terlocutory motion a step that is, in truth, the greatest
“ part of the relief It is much more wholesome,
“ where the parties have contracted for this mode of
“ settling their differences, and the point in dispute is

(s) Notes in Jarman and Bythewood's Precedents, Edition of 1830, Vol. VII. p. 34.

“ one which is expressly provided for, to let them try
 “ whether they cannot so settle it, than that this Court
 “ should interpose upon this sort of summary applica-
 “ tion.”

How affected
 by 17 & 18
 Vict. c. 125.

So stood this matter down to the passing of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). Sections 11 to 18 of that Act contain very important provisions still in force as to the law of arbitration, and they are all very well worthy of your attentive perusal, but the eleventh section is the most material one for my particular purpose. The substance of it is, that whenever the parties to any deed or instrument in writing agree that any existing or future differences between them shall be referred to arbitration, and any one or more of the parties nevertheless commence an action against the others in respect of any of the matters so agreed to be referred, it shall be lawful for the Court, on application by the defendant after appearance and before plea or answer—which would now read before Statement of Defence—upon being satisfied that no sufficient reason exists why the matter in dispute should not be referred to arbitration, and that the defendant is willing so to refer it, to stay all proceedings on such terms as to costs and otherwise as to the Court seems fit. The section concludes with a proviso that an order made under it may at any time afterwards be discharged or varied as justice may require.

If you examine this section a little carefully you will see that it leaves the Court entirely unfettered. Even when a judge is satisfied that no sufficient reason exists for not referring a matter to arbitration, it is only a case of “ it shall be lawful,” and I daresay most of you are aware that in the leading modern case of *Julius v. The Bishop of Oxford* (L. R., 5 App. Cas. 214), that expression was held to leave discretion quite unfettered—in other words, to be permissive only and not imperative.

The practical result of the Act has, however, been this—that it has freed the Court from many of its old doctrines and decisions, and set the current of authority running in the other direction. The law, as stated by Lord Justice Lindley, stands at present in this way—that where there is a *bonâ fide* dispute within the meaning of an agreement to refer, and there is no satisfactory reason why such dispute should not be settled by arbitration, legal proceedings will be stayed, even though the agreement to refer is contained in articles of partnership for a term of years which has expired (*t*).

How regarded
by the Court
now.

Merely to give you a few samples of the mode in which the Court exercises its discretion, I may mention that, in the following instances, it has declined to interfere—where there have been several matters in dispute, only some of which fell within the agreement to refer (*u*); where one of the parties had become bankrupt (*v*); where there was a *bonâ fide* suggestion of fraud (*w*); and where the Court was satisfied that the defendant's only object was delay, and there was really nothing in dispute (*x*).

So much then as to the law bearing upon the abstract matter of an arbitration clause. With regard to its draftsmanship there is not very much to be said. In some cases of course the partners are willing to make it embrace wider issues than in others—for example, it is entirely a matter for personal choice whether they will remit to arbitration the value and terms of payment for the interest in goodwill of an outgoing or deceased partner, or whether they will declare by the articles upon what principle it is to be valued and paid for. Sometimes the arbitration clause goes the length of giving power in terms to arbitrators to award a dissolution;

Draftsman-
ship of clause.

(*t*) Lindley on Partnership, 4th edit. p. 869.

(*u*) *Wheatley v. Westminster, &c. Coal Co.*, 2 Dr. & Sm. 347.

(*v*) *Pennell v. Walker*, 18 C. B. 651.

(*w*) *Wallis v. Hirsh*, 1 C. B., N. S. 316.

(*x*) *Lury v. Pearson*, *ibid.* 639.

and there is apparently some authority for the proposition, that even without this clause an arbitrator may, under a general submission of all matters in difference, award a dissolution, though I should not myself feel very confident of the award standing in the absence of express power to the arbitrator to dissolve. In so far as you have any discretion in the matter, I think that you will exercise it wisely in the direction of making the clause as comprehensive and wide as possible, and for the rest the great thing above all others is to make it clear and free from all possible ambiguity. It is bad enough for partners to be plunged in a suit or a hostile arbitration, and it is a cruel addition to the situation when the determination of the matters really in dispute has to be preceded by the determination of the meaning of the clause under which those differences have to be adjusted.

I must not omit to point out that, in order to prevent a reference to arbitration from becoming revocable at pleasure by either party, at any moment prior to the actual making of the award, it is essential that the clause should in terms provide for the agreement being made a rule of Court. The very recent case of *Fraser v. Ehrensperger* (53 L. J. R., Q. B. D. p. 73), affords a striking illustration of the importance of bearing this in mind.

Concluding
observations.

A few words in conclusion upon the subject of this and my previous Lecture. You may probably have gathered from what I have here and there said that I do not regard partnership articles as falling within the class of instrument in which the services of counsel may, generally speaking, with any great advantage be employed. Nor do I. To me it seems that, in order to get partnership articles properly drawn by counsel, it is necessary to place before him instructions as troublesome and difficult to prepare as the articles themselves. The arrangement is of a character dependent upon the intentions and wishes of the partners. In so far as the

articles should embrace any common form provisions applicable to partnerships in general, your clerk can copy them out for you just as well as a barrister's clerk can copy them out for him; and in so far as the terms are special and appropriate to the particular circumstances, the solicitor must either prepare the clauses, or, as I just said, prepare heads or instructions virtually embracing the clauses. Like most general observations, this one is of course subject to exceptions; and I am very far indeed from saying that, where the interests are important, or the provisions very complicated, you may not with advantage bring another mind to bear upon them, even if it be only as a critic upon your own method of expressing the terms. I am rather warning you against the supposition that if two or more persons are going into partnership, your duty will be discharged by sending a back sheet to counsel with an endorsement requesting him to settle partnership articles between them. You, the solicitor, must think the matter out, must bring your own mind to look at it in all its bearings; and if it seems fitting to you to invoke the assistance of a learned counsel, you must be sure that you provide him with accurate materials.

You will not suppose that all you need learn on the subject of partnership articles, even from a conveyancing point of view, can be compressed into two Lectures. I shall have gained the utmost I can hope to accomplish if I have succeeded in leaving upon your minds a lasting impression of general principles and rules by which to guide your steps. Suffer me to advise you earnestly not to rest and be content with this groundwork of knowledge, but to supplement it by reading and personal observation, so far as you can do so consistently with a due regard for the many branches of learning which claim the law student's attention.

THIRD LECTURE.



LEASES <i>and</i> AGREEMENTS FOR LEASES.	{	THEIR RELATION TO EACH OTHER.
		DEDUCTION AND INVESTIGATION OF INTENDING LESSOR'S TITLE.
		COMPETENCY OF PARTIES.
		EFFECT OF LEGISLATION ON DRAFTSMANSHIP OF LEASES.

THIRD LECTURE.



IN this and my next following Lecture your attention will be directed to the subject of Leases and Agreements for Leases from the special point of view in which the preparation and perusal of these documents should be approached by the solicitors for the lessor and lessee. In order to clear the ground at starting, let me say at once that in speaking of leases I shall confine myself to those intended to create in solid reality the relationship of landlord and tenant, and put out of sight altogether those, in a sense, artificial terms of years of which Mr. Joshua Williams says (*a*) that they are created by settlements, wills or mortgage deeds, that no rent is usually reserved in respect of them, that they are frequently for 1,000 years or more, that they are often vested in trustees, and that their object is usually to secure the payment of money by the owner of the land.

Subject of
Third and
Fourth Lec-
tures.

Class of
leases dealt
with.

There are so many principles of law and matters of practice common to leases and agreements for leases, and the distinctions to be drawn between them are so plainly marked and easily grasped now—though, as I shall show you, it was not so formerly—that I think my best course will be first to explain shortly the relation which they bear to each other, and then for the most part to turn your attention to points more or less common to both.

Treatment of
subject.

We shall best arrive at a clear understanding of our duties, in so far as they turn upon any distinction between leases and agreements for leases, by consider-

As to distinc-
tions between
leases and
agreements
for leases.

(*a*) Williams' Real Property, 13th edit. p. 339.

ing how the law stands in this matter, and for this purpose we must needs go back to the Statute of Frauds (29 Car. II. c. 3).

Statute of
Frauds.

Before the passing of that Act a tenancy for a term of years of whatever length might be created by verbal agreement. This state of things, which was a relic no doubt of the small regard paid in olden days to interests in land which did not involve any feudal obligations, was put an end to by the Statute of Frauds, the first and second sections of which declared that a lease by parol, unless it were a lease for a term not exceeding three years, at a rent of at least two-thirds of the full improved value, should have the force and effect of an estate at will only, while the fourth section enacted in substance that no action should be brought whereby to charge any person upon any contract or sale of lands, or any interest in them, or upon any agreement not to be performed within a year, unless the agreement, or a memorandum or note of it, should be in writing and signed by the party chargeable or his authorised agent.

How evaded
by Courts.

These two sections led to this odd result—that under the first and second sections a good *lease* could be made for any period up to three years by word of mouth, while under the fourth section a verbal *agreement for a lease* was void, however short the term might be. In both cases the Courts managed, to a certain extent, to get round the Act; for although the first section declared that a lease by parol for more than three years should have the effect of an estate at will only, it was held at law that a good tenancy from year to year on the terms, in other respects, of the void lease might be created where entry was made under it; and the Court of Chancery went as usual a step farther, and where the tenant had entered under a void lease, compelled the landlord in many cases to grant a valid lease upon the principle that the part performance of one party entitled him to specific performance by the other.

The same doctrines were applied substantially to void agreements for leases under the fourth section of the Act.

Inasmuch as no special form of words was ever necessary to constitute a valid lease, the intention however expressed by the one party to give, and by the other party to take possession, being in fact *prima facie* sufficient for the purpose, it fell out that after the passing of the Statute of Frauds questions constantly arose in the Courts of Law as to whether in a given case, and especially of course where the document was informal, an instrument in writing amounted to an actual present demise, or only to an agreement to grant a future lease; and it is not an exaggeration to say that the varieties of the language in which the meaning of the parties might be expressed, and the refinements of which the construction of different words used admitted, resulted in a perfect forest of decisions.

This state of things lasted down to the year 1844, 7 & 8 Vict. when the Statute 7 & 8 Vict. c. 76 was passed. That Act was, however, repealed and superseded in the following year by the well-known Real Property Act of 1845 8 & 9 Vict. (8 & 9 Vict. c. 106), and the way in which this particular matter was dealt with by the latter Act was to require c. 106. that all leases then required by law to be in writing should thereafter be void at law unless made by deed. This, as you will see, excludes the possibility of construing as a lease any instrument not under seal to the validity of which writing would have been necessary under the Statute of Frauds.

I need hardly say that a great many instruments not under seal have been entered into since this Act as to which it has been difficult to collect from the language used whether the parties intended them to operate as leases—in which case they would have been void at law—or as agreements for leases, in which case they would not have been open to objection. Of the decisions

to which ambiguity of this sort has given rise, it is observed in the 12th edition of Woodfall on Landlord and Tenant (p. 119), that since this Act "Courts of Law will construe a writing rather as a valid agreement for a lease than as a void lease"; and to that observation I would only add, that under the equitable doctrines which now prevail, it is very difficult to imagine a case in which effect would not be given, whether by way of specific performance or otherwise, to a written document in which the intentions of the parties to create a tenancy is expressed, and especially of course where they have in any way acted upon it.

Present state
of the law.

The state of the law on this subject may, therefore, be summed up in this way:—

(1) An agreement for a lease falls within the fourth section of the Statute of Frauds, and must, therefore, be in writing and signed, although effect may be given to a verbal agreement, on equitable principles, where it is complete in its terms, and the parties have acted on it.

(2) A lease may be made by parol for any term not exceeding three years if a rent be reserved of two-thirds of the full value.

(3) All other leases will be void *as leases* unless made by deed, but when not so made will generally be construed as agreements for leases and have effect given to them in that character.

Practical con-
clusions.

Taking these, then, to be the first principles, what moral should we, as practitioners, deduce from them for our guidance?

Contracts for
tenancy
should be in
writing.

First, with regard to such leases as may, if the parties so please, be made by word of mouth, we may safely assume that, when so made, they will not come before you at the stage of their creation, but at the almost inevitable later stage of the lessor and lessee being at loggerheads and disputing the terms of the letting. But it may be worth while for me just to remind you in passing that many things which are lawful are not expedient, and that if

you ever do have occasion to deal with the point, as professional advisers you should set your faces most emphatically against the creation of a tenancy for however short a time, unless it be a mere question of weekly lodgings, without writing. All may, of course, go well in this or that particular case without this precaution, but experience most abundantly shows that the frailties of human nature render it, in the vast majority of cases, essential to preserve written evidence of the terms of a bargain of any importance which is not performed right out of hand; and of all the bargains to which the observation applies, that between landlord and tenant needs perhaps more than all others to be incorporated in a written instrument. I remember not long since acting for the lessor in a case in which a furnished house was being let for a term—unusually long for a house let in that way—of three years. The tenant was in his own esteem, and in that of his wife, a gentleman of some position, and he was very indignant because I insisted, in the interests of the landlord, on having a written agreement for a lease. He declared, in effect, that he had not had such an agreement in the case of the house he was leaving, that the landlord of that house regarded him with feelings of profound respect, that his word of honour as a gentleman ought to be more than enough to satisfy me, and much more to the same effect. He was good enough even to suggest that my requirement was animated by a desire to promote the interests of my pocket, and by no other consideration whatsoever. It is a literal fact that this individual had not been inside the house for one week before he raised a contention directly at variance with the terms of letting, and which I was only able to defeat without a long wrangle, and probably expensive litigation, by the aid of the agreement. I mention this just as a simple instance of what may happen to any one of you in practice.

When lease
and when
agreement for
lease appro-
priate.

Assuming that the terms of tenancy are expressed in writing—whether as a matter of prudence, though not of necessity, in a case falling within the exception to the Statute of Frauds, or as a matter of legal necessity, in a case to which that Act and the Statute 8 & 9 Vict. c. 106 apply—the question arises, when would a lease and when would an agreement for a lease be the appropriate instrument? And this, of course, is a question which every well-instructed practitioner should be able to answer.

I am not able to suggest any appreciable difference in point of legal force or value between the two classes of instrument. In so far as the more liberal doctrines of equity were at variance with the technical rules of law as to the position of a tenant holding under an agreement for a lease as compared with that of an actual lessee, I apprehend that the 25th section (subsection 11) of the Supreme Court of Judicature Act, 1873 (36 & 37 Vict. c. 66), which declares in effect that the rules of equity are to prevail wherever they are in conflict with the rules of law, has clearly swept away any distinction (*b*). At the same time it is not, I think, absolutely clear that a lessee may not still possess some very shadowy advantages, as, for instance, in the case—a very extreme illustration, I admit—of his being ousted from possession by a third person and compelled to bring an action for recovery of the property. I am not by any means sure that he could, even now, maintain such an action in the absence of his being clothed with the legal ownership of the term. Again, for purposes of marketable dealing with the leasehold interest, I think that a lessee who can execute an assignment of a legal term occupies in some slight degree at least a better position than a man holding only an executory contract to grant a lease.

(*b*) See *Walsh v. Lonsdale*, 52 L. J. R., Ch. Div. 2.

Putting aside refined technical considerations, and looking at the matter in a practical way, it is, I think, tolerably evident that, all other things being equal, two people who desire to create the relations of lessor and lessee in fact may just as well enter into a lease while they are about it, as into an agreement for a lease, followed or not followed, as the case may be, by a lease. In a good many cases it would be difficult to say why the other plan is adopted, especially when it is borne in mind, as to leases for terms not exceeding thirty-five years, that the same stamp duty is imposed upon an agreement for a lease, as if it were an actual lease by deed. But there may be reasons more or less sufficient for entering first into an agreement and then into a lease, or for entering into an agreement which entitles either party to require a lease to be executed, but without any actual intention on either side of making that requirement. It may be that the granting of a lease is to be conditional on the performance of some act by the tenant which is stipulated for in the agreement, as, for instance, that the tenant is to build a house within a certain stipulated time, and is then to have a lease granted to him on such and such terms. Or perhaps the granting of a lease is one of several stipulations of an agreement involving other matters also, as where a partnership is formed or reconstructed and arrangements are made as to the premises used for carrying on the business, which belong perhaps to one member of the firm. Or again, time or economy may be a great object, and the more concise mode of expression used in an agreement under hand may be considered on that account desirable. But this last reason does not commend itself to me, and I will tell you why. The difference in length between an agreement for a lease so framed as to be capable of forming a clear and therefore easily expressed contract, and an actual lease, is not at all considerable now, what-

ever it may have been in the days when every deed was framed on the principle of stuffing ten words into it everywhere to express the meaning of one, and it can only be made considerable at the cost of giving the parties a contract which may afterwards form the subject of a very pretty suit. When it is said in an agreement that a future lease is to contain certain provisions, it is imperatively necessary that it should state with sufficient clearness what those provisions are to be, but this is just exactly what agreements frequently do not do; and the consequence is that when one party calls on the other to carry out the contract, it is discovered that it is not by any means clear what the contract means. In some cases a desire to cultivate brevity has even led to the insertion in such an agreement of the expression "&c.," of which I need hardly say, perhaps, that it is not calculated to facilitate the construction of the instrument. Another very fruitful source of trouble is a trick of using in an agreement such expressions as "usual provisions" or "usual covenants;" a class of phrase which nearly always results in a wrangle when the lease comes to be settled, and, as the Reports abundantly testify, not unfrequently ends in litigation. For although no doubt—as the result of litigation—the law is tolerably well settled as to the "usual provisions" of an ordinary lease granted to-day (*c*), it may be very difficult to reconcile provisions expressed in an agreement with these incorporated "usual provisions," and it may also be very difficult to determine how far any given provisions are usual when applied to some particular subject-matter of letting.

Remember, I am not saying for a moment that there is any reason why an agreement for a lease should not answer all practical purposes. I am only warning you not to suppose that it is an instrument which can be expressed, as of course, in a few elliptical sentences; and

"Usual provisions."

(*c*) See *Hampshire v. Wickens*, L. R., 7 Ch. Div. 155.

to take care when you have to prepare or peruse such an instrument that it so clearly and definitely embodies the terms of the tenancy as to be capable without a shadow of ground for dispute of being relied upon for all purposes as the chrysalis of a lease. By all means express yourself as concisely as you please within the limits of a good and sufficient contract, but do not, as is sometimes done, carry the worship of brevity to the length of leaving out really necessary provisions.

In each case then, as it arises, you must ask yourself whether there is any really good and sufficient reason why an agreement for a lease should be entered into, as distinguished from an actual demise. Where no such reason exists, you will be wise, I am sure, to lean in the direction of a lease; and where there is such a reason, you will most certainly do well to be very careful to see that its terms are clear, definite, and in all respects sufficient to give effect to the wishes of your client, with such superadded clauses as may seem to you to be necessary or desirable in his interests, whether upon general principles or with reference to the particular facts.

Practitioner's
duty.

So much as to the distinctions between the two classes of instruments. But before leaving the subject of agreements for leases, I must not omit to direct your attention to one important point bearing upon them which has no relation to leases, but, on the contrary, can only arise where an agreement for a lease is entered into, or, at all events, at a stage anterior to the granting of a lease.

Before the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), came into force, an intending lessee would have been entitled, in the absence of stipulation to the contrary, to call for and investigate the lessor's title. By the 2nd section (sub-section 1) of that Act, the onus was shifted to the other side. It was provided that under a contract to grant a term of years, whether

Former and
present law as
to right to
investigate
intending
lessor's title.

derived or to be derived out of freehold or leasehold estate, the intended lessee should not be entitled to call for the title to the freehold.

This provision was extended by the 13th section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), by excluding the lessee from calling for the title to the leasehold reversion upon a term of years *derived out of a leasehold interest* in land. Both provisions are, however, limited strictly to leases for a term of years, and have, therefore, no application to leases for lives or for any other measurement of time or interest than a fixed period of so many years.

As the law now stands, therefore, if I agree to grant a lease, the intended lessee cannot, if I am a freeholder, call for the title to my freehold reversion, unless the contract gives him in express terms a right to do so; and if I hold an underlease, he is similarly precluded from calling for the title to the leasehold reversion.

The practical questions which arise on this state of the law obviously are, When ought a solicitor for a lessor to insist on precluding the lessee from inserting a clause giving him the right which, in the absence of express provision, is taken away by the statute? And, conversely, when ought the solicitor for a lessee to stipulate on his client's behalf for the right to investigate the lessor's title?

We may, I think, dispose of the duties of the lessor's solicitor in both these cases in a few words. Ordinarily speaking, his client has nothing to gain or lose by the investigation if his title is a good one, and, if it is not a good one, he manifestly ought not to attempt to grant the lease. As to the expense involved it may in many cases—for instance where an ordinary rack-rent lease is the subject of the bargain—be fairly stipulated on the lessor's side that, if the lessee chooses to investigate the title, he must bear the expenses incurred in deducing it to him. And where this stipulation is carried the lessor will take no harm generally from conceding the investigation, though he may, of course, be subjected to

Practical
duty of in-
tending
lessor's soli-
citor as to
investigation
of lessor's
title.

the annoyance of delay, and be put to trouble, which he would rather avoid.

I have looked with some curiosity into the leading books of precedents published before the Vendor and Purchaser Act, 1874, to see whether it was then regarded as the right practice to preclude the lessee by stipulation from exercising his right of investigating the lessor's title, and I have satisfied myself that the large majority of precedent writers did not then insert such a clause as an appropriate common form provision. Whether it was considered that the lessor had no great object generally to gain in resisting the lessee's right to such an investigation, or that the expense to which the lessee would be put by adopting that course would be prohibitory in ninety-nine cases out of a hundred, I am not prepared to say, but I should imagine that both of those reasons conduced to the result of commonly, though not invariably, leaving the parties in that respect to their rights and liabilities under the general law.

When we come to consider the matter from the lessee's point of view we are met by some, but not, I think, very great difficulty in arriving at a conclusion as to the course which his solicitor ought to take.

Practical
duty of in-
tending
lessee's soli-
citor.

Now, to begin with, it is a fundamental principle of real property law that a lessee has constructive notice of his lessor's title. If, for example, I accept a lease of property, the ownership of which is affected by any restrictive covenant, I am supposed to have notice of the restrictive covenant, whether I do, as a matter of fact, know of its existence or not. This principle has not been affected—remember this, pray—by the Vendor and Purchaser Act, 1874. That point was very forcibly put by the late Master of the Rolls in a case of *Patman v. Harland* (L. R., 17 Ch. Div. 353; 50 L. J. R., Ch. 642) in this way:—

“All the Vendor and Purchaser Act does is this—
“it makes an express stipulation necessary to see the

“lessor’s title; whereas formerly the rule was the
“other way, that without express stipulation the lessee
“had a right to see it. Formerly if the lessee had
“expressly stipulated not to look into his lessor’s title,
“it would not have affected the doctrine of constructive
“notice. A man may bargain to shut his eyes, but if
“he does wilfully shut his eyes, whether as a bargain
“or not, he will still be liable to the consequences of
“shutting his eyes Under the statute, where there
“is no proviso entitling the lessee to look at his land-
“lord’s title, it is exactly the same as if he had expressly
“bargained not to look into his lessor’s title.”

You will see, therefore, that when settling an agreement for a lease on behalf of a lessee, you now have to consider whether or not to insist on or, at all events, endeavour to procure the insertion of a clause giving your client this right of investigation of title; or, again, in the alternative case of an agreement being entered into, whether to demand this investigation as a preliminary to the acceptance of a lease.

Speaking generally, I have no hesitation in saying that you may with propriety refrain from any attempt to secure the right. Taking the case of an ordinary occupation lease of a dwelling-house, for instance, you would incur the just censure of your client if you were to put him to the heavy expense of an investigation of the lessor’s title; such a thing in practice is unheard of.

But there are leases and leases; and it is quite a different matter where your client is taking, we will say, a building lease of a piece of land at a ground rent and entering into covenants to lay out a very large sum in erecting houses on it, or a lease for ninety-nine years of a piece of land on which he is going to sink a pit at an expense of a great many thousands of pounds. In such cases as this—whenever the consequences of the lessee’s being ousted by a title superior to that of his lessor would be of grave moment—his solicitor is not

only justified in satisfying himself as to the lessor's title, unless it is, so to speak, a matter of public knowledge that the title is a good one, but it is, in my opinion, a matter of common prudence that he should do so. If the lessee objects—if he prefers to take the small chance of his lessor's title proving to be a bad one in preference to the certain expense involved in setting that point at rest—well and good. Clients may, as Sir George Jessel expresses it, bargain to shut their eyes if they please. But it is one thing for the client to shut his eyes with knowledge of the certain or possible consequences, and another thing for his solicitor to allow him to do so in ignorance of them. And therefore I am anxious to impress upon you that there are some descriptions of lease as to which the security of the lessee in the enjoyment of the property leased may be every whit as important as that of a man who has purchased right out a piece of freehold land, and that this is a point to be practically kept before your eyes when you are dealing with an agreement for a lease.

From this point I propose to speak of leases only, but I may just point out to you that in doing so I necessarily cover agreements for leases also. If, for example, I satisfy you that in given circumstances a particular covenant should be inserted in a lease, it will be a necessary deduction in your minds that an agreement for a lease should in the same circumstances contain a corresponding stipulation that such a covenant should be inserted.

Agreements
for leases
included in
observations
on leases
from this
point.

Now the first matter of all must obviously be whether the lessor is competent to make a lease at all. Is he under no legal disability? Again, is he a free agent in the matter, or, if restricted by the terms of any instrument, acting within the limits of whatever conditions may be imposed on his leasing capacity?

As to legal
competency of
lessor.

I could not, however, enter into this subject without

trespassing, at too great length, on domains which lie outside the limits of my subject, and I must needs assume for my purpose the competency of the lessor. Nevertheless, I would ask you to store up in your minds the fact that clients very often do propose to grant leases in excess of their powers, and that a competent conveyancer must always be on the look-out to keep matters straight in this respect. I am not referring so much to such inherent legal disabilities as infancy or lunacy, because it is hardly needful for me to warn you that if you were instructed by a child of ten or a gibbering lunatic to prepare a lease, you could hardly act on the instructions with propriety; but I have rather in mind the artificial or partial disabilities which arise from restrictions contained in settlements, wills or mortgages, and in the case of property held by copyhold tenure, and which affect trustees, tenants for life, mortgagors, copyholders, and so on. Wherever the proposed lessor's interest in the property is affected by any limitation or restriction, it is always necessary to consider carefully whether he is in a position, either alone or with the concurrence of some other person or persons, to grant a lease, and if so, whether any special limit attaches to the exercise of the right in respect of the length of the term or of the other provisions of the lease. I would just draw your attention in passing to the important effect of the eighteenth section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), upon the leasing powers of mortgagors, of which I treated fully in my former course of Lectures (*d*).

The competency of the lessee to accept the lease is, of course, also a matter which concerns the lessor, as it cannot serve his purpose to grant a lease only to dis-

(*d*) See Turner's Duties of Solicitor to Client as to Sales, Purchases and Mortgages of Land, pp. 279—285.

cover afterwards that it is void or voidable by reason of some legal disability on the part of the lessee.

It is obvious that the disability of a lessee does not stand on the same ground, in all respects, as that of a lessor, because, while nothing is commoner than to tie up the ownership of any given property in such a way as to affect, more or less, the power of leasing it, no one would dream of fettering the power of a person, otherwise legally competent, to accept a lease either of a particular property or of property in general, unless in circumstances so exceptional that we may discard them from consideration. For all practical purposes, therefore, the disability of a lessee turns only upon the general principles of law which curtail the power of ecclesiastical persons, trustees, infants, lunatics, and others to occupy the position of lessees. It is not practicable for me to enter into the nature and extent of these disabilities consistently with doing justice to other matters which fall more appropriately within my subject, but you will find them enumerated and dealt with exhaustively in the second chapter of the twelfth edition of Woodfall on Landlord and Tenant, pages 62—72.

Kindly, then, understand that the competency of both parties to the lease, and the fact that the lessor is acting within his power, in so far as the provisions of the instrument are concerned, will now be assumed by me.

We will suppose that your client is proposing to grant a lease, and that he instructs you to act for him in the matter.

I need hardly say, perhaps, that to his mind the two most important points of all will be the amount of the rent and the respectability and financial repute of the proposed lessee, and it may be—for there are some clients who expect a solicitor to do everything under the sun—that on both these matters he will seek your advice. Now, as to the amount of rent which should be paid, you may or may not be in a position to express

As to competency of lessee.

First considerations for intending lessor—amount of rent and responsibility of intending lessee.

a reliable opinion; your ability to do so will depend on such matters as the extent of your knowledge of the property and the neighbourhood, and of your practical experience in that particular way; but I would say to you of this, as I said in my former Lectures on the subject of estimating the value of a mortgage security, that such advice does not fall within the compass of your professional duties as lawyers, and that no one of you need be ashamed of feeling unable to give it. Indeed, for myself, I would go a step farther and maintain that the less solicitors meddle, generally speaking, with matters for which they have had no professional training, the better is it for the dignity of the profession to which they belong. At the same time there is, of course, in all these things, room for the exercise of discretion and tact, and within the limits of what is honourable and right clients must be pleased if possible. I remember a friend of mine telling me once that he acted for some ladies who lived in a remote country district, and knew very little of the ways of the world. The consequence was that they looked on him as an admirable Crichton, and thought he could do anything and everything they wanted. He had accepted the situation as far as possible, and executed a good many commissions, the remuneration for which is not recognized in any scale with which I am acquainted, when behold, one day he received at his office a large packet, and on opening it discovered the manuscripts of two novels which these worthy females had composed, and a letter requesting him to be good enough, as the solicitor of the writers, to get the books published. I am sorry to have to confess that he did so, and let loose on the world two of the most hopelessly bad novels I ever attempted to read.

As to the other matter which I mentioned—that of the responsibility, and so forth, of the tenant—a solicitor may render very useful service, and I cannot but think

that this is a matter about which lessors have a tendency to be far too lax, and may often receive a warning note from their solicitors with advantage. Tempted, perhaps, by a high rent, a lessor looks with blinded eyes at whatever evidence of the tenant's responsibility is placed before him—forgetting that nothing is easier, in general, than to get one or more letters of reference, which may mean anything, and tie the writers to nothing—that it matters nought, whether the rent be fixed high or low, if the tenant does not pay it—and that the recovery of possession of premises back from a tenant is still one of the most troublesome proceedings in law. It is, I think, obvious that a solicitor should, from his training and habit of weighing the statements of third persons, be better qualified than the lessor himself to judge of the fitness of a proposed lessee, and that this may fairly be regarded as falling within the range of his professional duties; though, of course, the lessor must decide for himself whether or not he will commit this particular task to his solicitor, and again, ultimately, whether or not he will accept the proposed tenant.

These preliminaries adjusted, it will be the duty of the lessor's solicitor to prepare the draft lease, and submit it for the approval of the lessee's solicitor. Our attention may, therefore, be fitly turned to the draftsmanship of the document, and I think that I shall best clear the way before us by endeavouring to show you how far in these days of revolutionary conveyancing legislation the task of preparing a lease has been affected by statute. Let me preface my observations on this head, however, by saying that I am now proposing to deal only with legislation affecting indiscriminately all sorts of leases alike, and not with Acts—such as, for instance, the Agricultural Holdings Act—which affect particular classes of lease in substance and principle rather than in form.

Preparation of
draft lease.

How far
affected by
legislation.

I must first direct your attention to a statute passed 8 & 9 Vict.
c. 124.

nearly forty years ago (8 & 9 Vict. c. 124), the object of which was to bring into use, where the parties so desired, a concise form of lease having the same effect as a much longer form of lease. If you turn to the Act you will find the scheme to be, that certain short clauses may be used in leases to represent the same thing as certain long clauses to the same effect where the Act is adopted. But to the best of my belief this statute is rarely or never adopted. It has been unsparingly condemned by every text-writer who has dealt with it, and as the flogging of a dead horse is an eminently unprofitable employment, we may send it back, I think, to the obscurity from which I just drew it. But I have mentioned it here principally as leading me to the observation, that the attempt to abbreviate leases as a special class of instrument has not been repeated in the recent Conveyancing Acts. And the reason for this is not, I think, far to seek. The covenants for title in a conveyance admit of so little variation, either in form or substance, that they may well be implied by operation of statute law. But, though the covenants in one lease may and do in ordinary cases closely resemble the covenants in another lease of the same class, yet the variety of which the arrangements between lessors and lessees admit, and of the subject-matters of leases, is so great, that none of the component parts of a lease could for practical purposes be reduced to matter of implication by any legislative scheme of a simple character; and unless the scheme can be made simple, it is obvious that Parliament had far better leave well alone, and not pay for brevity the price of complication.

Such was evidently—and, if I may venture to say so, wisely—the view taken by the legislature when the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41) was passed, for, amid the sweeping changes in draftsmanship wrought by that statute,

leases are, in that respect, comparatively speaking, untouched.

Nevertheless, the draftsmanship of leases is affected in some slight measure by the Act, and it will not be unprofitable for us to give a little attention to the effect of the statute upon the preparation of this class of instrument, more especially, as in doing so, I shall be afforded an opportunity presently of directing your attention to important legal principles which turn upon the mode of expressing an obligation intended, as it is termed, to "run with the land."

And first, if you refer to the sixth section, you will find that a conveyance (which, by the second section, includes a lease unless a contrary intention appears) is to be deemed to include and is to operate, by virtue of the Act, to convey (which includes to demise) a number of incidental rights and easements enumerated in the section, and all or some of which used to follow the parcels and were known as "general words."

In conveyances these general words were often inserted at some length, but in leases it was very exceptional to do more than use some such expression as "Together with all rights, easements and appurtenances to the said premises hereby demised belonging, or reputed to belong, or usually held, occupied, or enjoyed there-with" (*e*), and the effect of this section is only therefore to render unnecessary one clause of inconsiderable length which it was before customary to insert. But I would impress upon you in this connection a warning which you will be wise to bear in mind. The general words set out in the sixth section are very large and wide, and cover a number of things, as to some at least of which the lessor may or may not, in particular circumstances, intend to include them in the lease, without some sort of exception or reservation. Do not therefore, when acting for a lessor, rely on the statute as

(*e*) Woodfall on Landlord and Tenant, 12th edit. p. 896a.

applicable in this respect to all leases without distinction, but remember that it is sometimes necessary to abridge these sweeping statutory rights by the light of particular circumstances, and that the intention to exclude the section wholly or partly, as the case may be, must be clearly shown in the lease. I was told not long since of a case in which these implied statutory general words had by carelessness been allowed to operate, with the result of passing, by a lease, rights which it was a matter of very serious importance in the lessor's interests to withhold.

Language of
covenants.

To turn to another matter of draftsmanship dealt with by this Act, the oft-recurring allusion in legal instruments to the heirs, executors, administrators and assigns—or, as the seasoned copyist is wont to term them in drafts, “the heirs, exs., ads. and ass.”—of covenantors and covenantees has been rudely disturbed at last by the Act to which I am referring, and as you will meet those words throughout your professional lives in dealing with leases granted before the Act, and will, I hope, have occasion to draw and peruse many leases by the light of it, it is very desirable that you should have a clear perception how the law now stands as to this matter.

It was very common, before the Conveyancing and Law of Property Act, 1881, became law, for a lessee to express his obligations in the way of covenant with his lessor in these terms :—

“The lessee doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessor, his heirs and assigns,” or, if the lessor were holding only a leasehold title, “with the lessor, his executors, administrators and assigns.” The converse mode of covenanting would be “the lessor doth hereby for himself, his heirs, executors and administrators, covenant with the lessee, his executors, administrators and assigns.”

Now the executors and administrators of a man have, Executors and administrators. or in other words, his personal estate has from very early times been entitled to the benefit and liable to the obligation of a covenant entered into, with or by him, as the case might be, and it follows that the insertion of these words in covenants was mere surplusage. But surplusage often dies hard, and it needed the authority of a statute to say, in so many words, that the executors or administrators need not be mentioned in covenants.

With regard to the word "heirs," however, which, in Heirs. a covenant, was of course symbolical with real estate of the covenantor or covenantee, the law stood on a somewhat different footing, and the word did possess a legal significance which made it a matter of importance in many circumstances to insert it in a covenant. What those circumstances were it is not material for my present purpose to consider, because I am speaking of draftsmanship in the present tense, and, as I shall presently show you, the legal value of the word "heirs" in a covenant, whether as an appendage to the covenantor or covenantee, has vanished.

There remains the word "assigns," which requires Assigns. rather more careful handling. This word had a curious virtue attached to it before the Conveyancing and Law of Property Act, 1881, and, in so far as a covenantor's obligation is concerned, still retains that virtue. There are two sorts of covenant connected with real estate—covenants which do and covenants which do not "run with the land"—that is to say, fasten themselves, so to speak, to the land, and attach inseparably to its ownership.

Now the question whether or not a particular covenant runs with the land has often formed the subject of litigation, and is not by any means always an easy one to answer. As most of you, I dare say, know, the great case on this subject is *Spencer's Case* (1 Sm., L. C. 7th ed. 60), and the general rules laid down by

that case in their application to leases may, I think, be fairly stated as follows :—

(1) That an assignee, whether of the reversion or the term, can, although not named in the covenant, avail himself of those covenants which concern the thing demised ; but

(2) That of such covenants those which concern something not in being at the time of the demise bind the assignee, if named, but not otherwise.

(3) That covenants which do not concern the thing demised, but are personal between the covenanting parties, do not extend to or bind assignees in any case—in other words, do not run with the land at all.

Let me give you a simple illustration of the distinction between these three classes.

If I, as lessee, covenant with my lessor that I will keep in repair a certain wall existing at the date of the lease on land demised to me, that covenant will bind my assigns, whether named or not. That is the first of the three classes.

Next, if I, as lessee, covenant with my lessor that I will build a wall on the demised land within ten years from the date of the lease, that covenant will not bind my assigns, unless they are expressly named, because the wall is not *in esse* at the date of the lease. That is an instance of the second class.

Again, if I, as lessee, covenant with my lessor that I will build a wall, not on the property demised to me but somewhere else, the covenant will not bind my assigns, whether they are named or not, because the covenant is personal and collateral to the thing demised. That is an instance of the third class.

Effect of
Conveyancing
Act, 1881,
on words of
covenant.

It is not necessary for me to state in detail the provisions of the Conveyancing and Law of Property Act, 1881, which affect the four words which we have been considering, but if you study carefully the fifty-eighth and fifty-ninth sections you will find them to result in

this—that the draftsman of a lease may now in all cases with perfect safety omit in covenants any mention of the heirs, executors and administrators, whether of the covenantor or covenantee, and of the assigns of the covenantee; while as to the assigns of the covenantor the Act has left untouched the series of decisions of which Spencer's case is the fountain, and the assigns will still be bound without being named only in those cases in which they would have been bound without being named before the Act. Thus the language of covenants is reduced to the simple formula: "A. hereby covenants with B.;" or, in a proper case, "A. for himself and his assigns hereby covenants with B."

N. B.

At the risk of being tedious I have dwelt somewhat at length upon this matter of covenanting language, and it may seem to you at first sight that the question whether in preparing a lease you should jerk in three or four hitherto familiar words in covenants or leave them out, is not after all a very important one. But, I am sure, that on reflection none of you will hold that view. It has always of necessity been recognized in the art of conveyancing that a draftsman should not omit anything material, but it has not by any manner of means been also always recognized that a draftsman should not insert anything which serves no useful purpose whatever. On the contrary, a school of draftsmanship has all but survived into your day, of which one of the chief aims appeared to be to insert in a deed as many superfluous words as ingenuity could suggest—which was a very large number indeed. But the tide has turned in the other direction, and I venture to believe that your attention will have been well bestowed on what I have now been impressing upon you if you have gained a clear understanding as to the difference between the old and new methods of expressing an obligation by covenant,

and as to the circumstances in which the use of the word "assigns" may still be of practical importance.

Provisions of
Conveyancing
Act, 1881,
affecting
leases in other
respects.

In concluding this part of my subject, and with it my third Lecture, suffer me specially to remind you that I have just been dealing with the Conveyancing and Law of Property Act, 1881, only in so far as it touches the art of draftsmanship of a lease prepared to-day. And to that let me add, that you will find in sections 10 to 14 of that Act provisions which have an important and exclusive bearing upon the law as it affects leasehold interests and reversions expectant upon them. Of these, I have already directed your attention in the earlier part of this Lecture to the 13th section, and I shall have occasion in my next Lecture to refer to the 14th section. But the 10th, 11th and 12th sections, important as they are in themselves, affect the legal incidents rather than the actual preparation of leases or agreements for leases, and therefore scarcely fall within my special metes and bounds—and I must needs refrain strictly from wandering into any side-path. The limits by which I am tied do not, however, bind any one of you, and I venture strongly to advise you while the subject of leases is fresh in your attention, to take an early opportunity of mastering the important propositions of law embraced in those sections.

FOURTH LECTURE.

LEASES <i>and</i> AGREEMENTS FOR LEASES <i>(continued.)</i>	{	TERM OF LEASE.
		RATES AND TAXES.
		FIXTURES.
		REPAIRS.
		AGRICULTURAL LEASES.
		RESTRICTION ON ASSIGNMENT.

FOURTH LECTURE.



I purpose in this Lecture to refer to some of the most important principles of law bearing on the relations of landlord and tenant. In addition to those which I have selected, there are, no doubt, others only less important as a question of degree; but I have endeavoured to collect those which are most worthy of attention from a conveyancer's point of view—which should be at the finger's ends of every solicitor who affects to prepare a lease on behalf of the lessor, or, as the case may be, to peruse it on behalf of the lessee. And I may point out to you, that without an accurate knowledge of at least the broad general principles of the law as it affects landlord and tenant, it is self-evident that you cannot efficiently protect your client's interests in the matter of inserting this or objecting to or seeking to modify that clause, because to a very large extent the key-note to the right performance of your duty in that respect will be your knowledge of the exact effect in law of the insertion, modification, or omission of the particular clause with which you are dealing. I shall hope to make this clear to you as we go along.

The first axiom is this—that a lease for years may begin as from a future date and be for any length of time, but the exact period of its commencement and termination must be fixed (*a*). Subject of
Lecture. As to term of
lease.

Most of you will probably be aware of the reason for the permissive part of this axiom—the future com-

(*a*) Williams' Real Property, 13th edit. p. 395.

mencement, that is, of a lease. It is referable to the distinction in law between a freehold and a chattel interest in land, and I need do no more than impress on you that the principles which preclude the commencement of a freehold estate at a future date, unless in the shape of limitations taking effect under the Statute of Uses, or as devises or trusts, have no application to terms of years. Your client may, at his pleasure, grant or accept a lease for twenty-one years to commence from to-morrow, or from any other future date he pleases, without offending the common law of the realm.

Side by side with this liberty, however, is the restrictive rule which I mentioned, the observance of which is no less compulsory in law than consistent with ordinary common sense—viz.: that there must be a fixed period of commencement and termination.

It is obvious that if there be any uncertainty as to the date of commencement, there must be equal uncertainty as to when the lessee's liability to rent and the other obligations of the lease on either side begin, and that the contract is not such as can reasonably be interpreted or enforced. A lease which is imperfect in this respect may, in some cases, just scrape through, because the law desires *ut res magis valeat quam pereat*; and as an illustration of this, I may mention that if no date of commencement is fixed at all, the term will be held to commence from the date of the lease, unless there is anything in its provisions which negatives the supposition that that was the intention of the parties. But the well-instructed draftsman does not desire to sail a course which will keep him just clear of danger, and therefore I would counsel you to bear in mind when preparing or perusing a lease, the need of impressing on it, beyond all doubt, the exact period at which it is to start and finish. And, remember, that in using the word "period" I do not necessarily mean a fixed date. A lease may be fixed to begin not only from a given

date, but also on the happening of a specified future event, such as the death of A. B. In the latter case the date is of course uncertain, and if A. B. survives either the lessor or lessee, the lease will be avoided altogether; but if they both survive A. B. then the date of his death, whenever it happens, will bring the term into existence and give it that certainty of commencement which the law requires.

My second proposition is this—that the property tax payable in respect of the rent, may always be deducted by the tenant, and that any contract to the contrary is absolutely void; while of other taxes some—such as land tax and sewers rates for extraordinary, but not for ordinary annual repairs—fall on the landlord in the absence of special agreement to the contrary, and others—such as the poor's rate—on the tenant; but the burden of all taxes, other than property tax may, as between the parties, be transferred from landlord to tenant, or *vice versa* (b).

As to rates and taxes.

Property tax.

When we come to dissect this, we are met first of all by the fact, that, as to the property tax payable on the rent, the legislature has thought fit to interfere with freedom of contract, and to say to lessors and lessees, “ You, the tenant, shall pay this property tax, and you shall afterwards recover it back from your landlord, in the shape of a deduction from your rent; and you, the landlord, must put up with the deduction, and if you attempt to get off it by express contract, your contract shall be absolutely void, and what is more, you shall be liable to a penalty of 50%, if you refuse to allow the deduction.” This is the effect of the statute 5 & 6 Vict. c. 35, sects. 73 and 103.

So far as property tax, therefore, is concerned, the law is clear enough; but this is not so as to other rates and taxes. Some few are what are called landlords' taxes,

(b) Woodfall on Landlord and Tenant, 12th edit. pp. 536 *et seq.*; Chitty on Contracts, 8th edit. pp. 317—319.

and many more are tenants' taxes, and it is not always very easy to say which is which; neither is it always easy, in the case of an ill-drawn lease, to say, in particular circumstances, whether the parties have or have not varied the general law by express contract.

Let us first consider landlords' taxes.

Land tax.

The land tax. This stands on much the same footing as property tax, except that landlords and tenants are left at liberty to make any contract they please as between themselves: in other words, it is recoverable from the tenant in the first instance, and he is empowered to deduct the amount from his next payment of rent, unless he has, as between himself and his lessor, agreed to bear it. The law as to the incidence of this tax is to be found in 38 Geo. 3, c. 5, sects. 4, 17, 18, and 35.

Sewers rate.

Next the *sewers rate*. This is partially a landlord's, and partially a tenant's tax. It falls on the landlord in so far as it is made for extraordinary purposes, and may be considered to permanently improve or benefit the property, and it falls on the tenant in so far as it represents expenditure on current annual repairs of an ordinary kind.

Rates under
Public Health
Acts and
other statutes.

There are various rates imposed by local bodies under the authority of the Public Health Acts and other statutes, such as rates for paving, and watching and lighting particular districts—and there are also special statutory enactments affecting the imposition of poors' rates on mines and plantations, and on property let for a period not exceeding three months, and so forth. The legislation as to these different matters extends over a mass of statute law, and the legislation applicable to houses in the Metropolis is quite distinct from that which is applicable to houses in other districts; and again, in some districts the law bearing on some one or more of the burdens of taxation attached to real property is regulated by statutes

passed with reference only to the particular locality. It would be quite impossible for me within our limits to present to you any comprehensive view even of the legislation which is general and not local, and I must content myself with impressing upon you that, while the policy of the statute law as a rule is to cast the taxes imposed under its authority on the occupiers as distinguished from the owners, there are some exceptions to the general rule; and you will find that although the taxes are almost invariably made recoverable in the first instance from the occupier, he is here and there authorized expressly to deduct all or some proportion of the amount from his rent, always supposing that he has not waived that right by the terms of his contract with his landlord.

I need hardly add on this point, that it is perfectly competent to the legislature to pass in the future either general or local statutes imposing taxes in connection with real property, and to throw them on landlord or tenant, or both, as to its wisdom shall seem fit.

It follows from what I have said, that if it is the intention of the parties to modify the general law by casting, as between themselves, on the tenant taxes which are now or may hereafter be payable ultimately wholly or in part by the landlord, in the absence of special agreement, that intention must be expressed in the lease, and expressed with sufficient clearness to embrace future as well as present taxes.

Where
general law
modified
by terms of
lease.

It may, I think, be said that landlords' taxes are exceptions to a general rule of law that rates and taxes fall upon the tenant in the absence of express contract; and further, that as a matter of intention and contract, even those taxes which are by law recoverable from the landlord are usually shifted on to the tenant's shoulders. This general course of dealing may, perhaps, account for the fact that the Court has taken hold of comparatively slight expressions as having this effect upon the liability

How rates
and taxes
generally ad-
justed be-
tween
landlord and
tenant.

for landlords' taxes. Thus, a covenant to pay all rates and taxes will include the land tax and sewers' rates, and a covenant to pay all taxes will include the land tax (*c*). But there is a limit to the construction, in the landlord's favour, of loose language of this kind, and an agreement to pay "all taxes, parochial and parliamentary," was held in a case of *Palmer v. Earith* (14 M. & W. 428), not to include the sewer's rate, on the ground that that was neither parochial nor parliamentary; and a similar decision was given in the case of *The Guardians of Bedford Union v. The Bedford Improvement Commissioners* (7 Exch. 777), as to an improvement rate made under a local Act.

Duty of
lessor's soli-
citor.

We may suppose that if you are preparing a lease you will desire, in the lessor's interests, to relieve him from all liability for rates and taxes of every kind, present and future, except, of course, the property tax; and to do so you will only have to be careful to make use of approved language which may be found in a hundred precedents ready to your hand. But let us suppose that you are acting for the lessee and consider shortly how you should act.

Duty of
lessee's soli-
citor.

First, as to the land tax. There is, as you no doubt know, a scheme for redemption of land tax, which is largely made use of for relieving lands of this burden. If, in your particular case, the land tax has been redeemed—*cadet questio*—because your client will in no event have to pay it. If it has not been redeemed, it will be a matter for your consideration whether you will seek to add the land tax to the property tax as an exception in the tenant's favour. The point may or may not be of practical moment as a question of amount, because, for reasons of a historical character upon which I cannot now enter (*d*), the land tax is a very heavy

(*c*) See Woodfall on Landlord and Tenant, 12th edit. pp. 529, 530.

(*d*) See Turner's Duties of Solicitor to Client as to Sales, Purchases, and Mortgages of Land, pp. 16—18.

burden in some districts, and hardly more than a nominal imposition in others. In principle it is difficult to see why an obligation cast by law on one man should be thrown on another, but there may be a variety of considerations which take the case out of abstract general principles. The amount involved may be so small as not to be worth serious discussion; or the lessor may strongly desire to be relieved of the trouble of tax-paying, and may fix the rent at a figure which fairly justifies him in expecting to be relieved of all taxation in respect of the premises; or the lease may be specially favourable to the lessee in some respects; or the lessor may tender a lease in a form settled for all the houses on a large estate, and you may be required to regard its contents as equivalent to laws of the Medes and Persians, which cannot be altered by any presumptuous lessee's solicitor. These and kindred considerations may affect the question whether or not you may be able to relieve your client from the obligation to pay the land tax. If you can do so it will, of course, be the better for him, and at least the point should be present to your minds as an open matter which may fairly be raised in the lessee's interests. I may add that, so far as I am aware, there is no great preponderance of settled practice one way or the other; but I am disposed to think that lessees come under obligation to pay the land tax oftener than they escape it.

As to the various other burdens of taxation affecting the property, you will be unable for the most part to relieve the lessee from liability to bear them. In so far as the taxes which by law fall on the tenant in the absence of special agreement are concerned, it is, generally speaking, hopeless to seek to cast them on the landlord, except in the single case of a furnished house; and this remark applies almost as forcibly to taxes which would fall on the landlord if your client did not relieve him from them. Nevertheless cases

do arise in which a too blind acceptance of liabilities for landlords' taxes inflicts grievous hardship on the lessee.

Illustrations.

*Payne v.
Burridge.*

I cannot, perhaps, illustrate this better than by a case of *Payne v. Burridge* (12 M. & W. 727), which is cited largely in the text-books. There the lease declared that the rent should be paid free and clear from all parliamentary, parochial, and other taxes, rates, assessments, deductions or abatements, and the lessee covenanted to pay all taxes, rates, duties, levies, assessments and payments whatever which were, or during the term should be rated, levied, assessed, or imposed on the demised premises.

A local Act had been passed, before the granting of the lease, under which commissioners were authorized to pave and flag foot-ways; and it was provided that the costs were to be paid by the tenants or occupiers of the houses next adjoining, and in default should be recoverable by distress. The tenant paid a rate made under this Act, and deducted the amount from his next payment of rent. On the case being argued the lessee contended, by his counsel, that the charge was for the permanent improvement of the premises from which the landlord was to derive a benefit, and was therefore payable by the latter, and that it was not within the lessee's covenant.

The Court, however, would not entertain the contention, and held, that even if the Act had been passed after, instead of before the covenant had been entered into, the lessee would have been liable, and in delivering his judgment C. B. Pollock said, "Mr. Erle urges that "by the Act of Parliament this burthen is cast on the "owner of the premises, and so no doubt it is; but the "same may be said of sewers' rates, the payment of "which, nevertheless, by the covenants of a lease, may "be thrown upon the tenant."

*Hartley v.
Hudson.*

I will mention one other case only, in which the

figures and facts are both rather startling—that of *Hartley v. Hudson* (L. R., 4 C. P. D. 367). In that case a lessee, whose annual rent was 40*l.*, covenanted to pay “all rates, taxes, charges, and assessments whatsoever, which now are, or may be, charged and assessed upon the said premises or any part thereof, or upon any person or persons in respect thereof,” land tax and property tax excepted.

The local board of the district gave notice to the plaintiff, as owner of the property, to sewer, level, pave, &c., the street in which the house was situate, and this notice was given under provisions of the Public Health Acts, by which the owner was made directly liable to comply with its provisions—so that in this case, as you will observe, the legislature did not even fix the tenant with liability in the first instance, but treated the owner alone as being the person liable. The expense incurred in consequence of this notice was 68*l.* 17*s.* 3*d.*, and it was held that, as between lessor and lessee, the latter had made himself liable to pay the amount, and judgment was given for the plaintiff.

Now just consider the effect of this case in its bearing on the duties of an intending lessee's solicitor. It may reasonably be supposed that when a lease is granted the lessee will be aware that he has to pay not only the rent but also the rates and taxes in the ordinary sense of the term—that is to say, the rates and taxes which fall in the usual course of events upon occupiers, such as the poor's rate and the inhabited house duty—but how many lessees will accept as a natural and proper incident of their position, a rate or tax representing a proportionate part of the outlay upon the construction of a main sewer or the paving of a road? Would not the obvious objection in any lessee's mind be this? “Here is a work of a permanent kind, of which the property in lease to me will benefit to all time. Why should the cost of it fall upon my shoulders, seeing that my interest

Practical
lesson from
these cases.

“is of a merely transitory nature and that I am paying
“a rent representing the full yearly value, and what can
“my solicitor have been thinking of to let me come under
“such a liability?” And will not that observation gain
added force in a case in which the lessee is alive to the
fact that the rate is in the eyes of the legislature properly payable by the owner, and that he, the lessee, has allowed the liability to be transferred to his own shoulders by the terms of the lease?

I see no answer to this myself, and I cannot for my part think that the interests of a lessee who, as in that case of *Hartley v. Hudson*, is called upon to pay a rate equal in amount to nearly two year's rent at one fell swoop, can be said to have been properly protected when the terms of the lease were under discussion.

Of course if the tenant, after being made aware of his probable or possible liabilities under this head, has chosen to accept the risk and give a covenant such as I have referred to, his solicitor is free from all responsibility. What I am urging upon you is, that when acting for a lessee you should not suffer your client to enter blindly and ignorantly into a covenant which may cast on him burdens of which he has not the least conception, and that you should in a proper case endeavour to get the terms of the draft lease modified so as to confine the liability within reasonable bounds.

To put this duty in a practical way, if your client is taking a lease of a house in the heart of London there will, of course, be no reason to apprehend that any question of making a main drain at the expense of the owners or occupiers of the houses in the particular road, or of paying the road in which the house is situated, can arise; and in such a case the point is not of practical consequence. But if the house is situate in some suburban or outlying district, I conceive that, as solicitor for the intending lessee, you will be put by that circumstance upon inquiry as to whether or not there is a

main sewer in the road, and, if so, whether the house is connected with it; and again, whether the road and footway are properly paved and flagged. If the answer to these questions is satisfactory, you will probably not think it necessary to modify the draft lease in this respect, but if there is any appreciable risk of the lessee being called upon, as the draft stands, to bear such expenses as those which were cast upon him in the cases just now brought to your notice, then I think that you should do your utmost to get added to the covenant for payment of rates and taxes a qualifying provision to the effect that the lessee shall not be deemed liable under the covenant to bear the cost of construction of any sewer, pavement, or other permanent work.

In pressing this advice upon you, I am well aware that such a qualification of the lessee's liability is not usual, and you will not, I think, find it in any book of precedents. But I confidently appeal to your common sense to support me when I express, as I venture to do, a strong opinion that liability such as has been fixed upon lessees in cases of the class of *Payne v. Burridge* and *Hartley v. Hudson*, is not such as they contemplate in one case out of a hundred—that it is tantamount to making A. pay for that which enures for the permanent benefit of B.—and that it requires no very extraordinary conception of the duties of a lessee's solicitor to hold that he should satisfy himself whether or not there is any reason for qualifying the provisions of the lease, so as to free his client from the risk of a most serious addition to the ordinary calculated burdens of a tenant.

We will now pass to my next proposition, which has reference to fixtures, and may be put in this way—
that a rule of law which prevailed in olden days, whereby, in the absence of special contract, all things attached by the tenant to the demised premises became the property of the landlord, has been relaxed to a considerable ex-

As to fixtures.

tent, but in unequal degrees, in the cases of trade, ornamental or domestic, and agricultural fixtures.

I shall hope to show you that knowledge of the general principles involved in this proposition is, in many cases, very essential to solicitors, both of lessors and lessees, and especially of the latter, at the stage of settlement of a lease.

The hard and fast rule, that everything affixed by a tenant to the freehold during his term became the landlord's property, has long since ceased to apply to the full extent; but it may be regarded, even in our day, as a general rule still in force, although many important exceptions to it have from time to time been admitted. I think it very desirable that you should, when acting for a lessee, approach the subject from that point of view, for the purposes of your practical duties as conveyancers, because, if you start with the assumption that things affixed to the freehold become the property of the landlord, you will be much more on the alert to consider whether, in any given case, it is necessary or desirable to vary that rule by express words of exception in your client's favour, or whether the modifications in the general law will sufficiently meet his case, than you would if you allowed yourselves hastily to suppose that, for practical purposes, the old rule has been swept away, and that you need pay no regard to it.

In former days, tenants for years were not punishable for waste; and it may be presumed that a tenant's legal inability to remove fixtures cannot have mattered very much to him, seeing that the landlord had no remedy for the violation of the rule. This state of things was, however, altered by the Statute of Gloucester (6 Edw. I. c. 5), which was not removed from the statute book till 1879. That Act gave the remedy of a "writ of waste" in the Chancery against him that held by law of "England, or otherwise, for term of life, or for term of years." The Act led to occasional litigation between

landlords and tenants as to questions of removal of fixtures; and it seems to have been established in the time of Henry the Seventh that trade fixtures might, in some cases, be removed by a tenant at the expiration of his term. A long series of decisions followed, by which the right of removal of trade fixtures was gradually advanced, though here and there particular fixtures were held not to fall within the exception to the general rule of law; and I think it may now be said that the right of removal of trade fixtures, properly so called, is bounded only by the very reasonable limitation that a trade fixture which cannot be removed without destroying or seriously injuring an important building would be held to be irremovable.

Trade fixtures.

The right of removal of fixtures put up for ornamental or domestic purposes is much more qualified, and of much more modern growth. In a well-known case, called *Poole's Case* (1 Salkeld, 368), decided, I think, in the reign of Queen Anne, Lord Holt upheld the exception in favour of trade fixtures, by ruling that a soap-boiler might well remove vats set up for trade purposes; but he also ruled that there was a difference between what the soap-boiler did to carry on his trade and what he did to complete the house—as hearths and chimney-pieces, which he held were not removable. But the rule has gradually become relaxed, and there are now many ornamental fixtures which a tenant is entitled to remove, such as hangings, looking-glasses, wainscot fixed by screws, and a number of other articles. I must, however, again warn you that the exceptions are not even now by any means as numerous or comprehensive in the case of ornamental fixtures as in the case of trade fixtures. And, as an instance of the fact, I may just mention that in the case of *Buckland v. Butterfield* (2 Broderip & Bingham, 54), which was decided about sixty years ago, and is the leading case upon ornamental fixtures, the Court declined to treat as an ornamental

Ornamental or domestic fixtures.

fixture a conservatory erected on a brick foundation fifteen inches deep, attached to the wall of the dwelling-house by fastenings, connected with the parlour chimney by a flue, and having two windows in common with the dwelling-house; and applied the same ruling to a pinery erected in the garden on a brick wall four feet high.

In the 8th edition of Chitty on Contracts you will find on pages 336 and 337 a sort of inventory of fixtures compiled under the two classifications of things which have been held not to be removable and things, not being trade fixtures, which have been held to be removable. If you analyse them carefully you will, I think, arrive at the conclusion that the distinction between the two classes is fairly well marked, on the whole, as a matter of common sense, but that the dividing line is, in respect of some of the articles, rather fine; and the fact that each one of them has been the subject of a reported case speaks volumes for the difficulty of the questions which arise in connection with fixtures.

Agricultural
fixtures.

There remains the third class—agricultural fixtures. To these the old doctrine has clung more pertinaciously than even to ornamental fixtures; and it was expressly decided in the year 1803, in the great case of *Elwes v. Mawc* (2 Sm. L. C. 6th edit. p. 153), that the favour shown to trade fixtures had no application to mere agricultural fixtures, the Court being of opinion that the authorities did not warrant an extension to this latter class of fixtures of the exception to the general law on the subject.

This decision stood as good law, and left agricultural tenants in a worse position than any other class with regard to the removal of fixtures, until at last Parliament interfered in the tenant's favour, and, by the statute 14 & 15 Vict. c. 25, s. 3, gave him a right of removal of farm buildings, detached or otherwise, and any other building, engine, or machinery, either for

agricultural purposes or for the purposes of trade and agriculture, erected voluntarily by the tenant at his own expense with the written consent of the landlord. The section imposes, however, on the tenant an obligation to give one month's notice to the landlord, and reserves to the latter a prior right of purchase at a valuation.

The Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92, s. 53), went much further, and gave to the tenant, subject to some stipulations as to payment of rent, and so forth, the absolute ownership of fixtures voluntarily put up by him; but the Act did not interfere with freedom of contract, and the option of negating its provisions was largely exercised.

This statute has been replaced, as from the 1st January, 1884, by the Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), which repeals the Act of 1875, but (in section 30) substantially re-enacts the provision to which I have referred. There is, however, nothing in the new Act which, in this particular matter of fixtures, prevents lessors and lessees from negating or modifying its provisions by express agreement; and it may therefore be said to leave the law as to agricultural fixtures in the same state practically as under the Act of 1875. Unless some revolution of feeling or custom takes place, the guess may, perhaps, be not very rashly hazarded, that where people, in making their bargains, are at liberty to control legislative provisions by contract, they will, in the future, largely avail themselves of the right as they have done in the past; but it would obviously be premature to express any decided opinion as to the reception which an Act so recently brought into operation will meet with.

Thus we have seen the inroad which has been made, in part by common law and in part by statute law, upon the old maxim *Quicquid plantatur solo, solo cedit*, with regard to these various classes of fixtures; but my attempt to present to your minds a bird's-eye view of

Fixture or no
fixture.

the law on this subject would be very incomplete if I were not to point out to you that in the observations which I have made thus far I have throughout *assumed* the word “fixture” as a datum or starting-point, and have directed your attention only to the exceptions which have been made in the tenant’s favour to a rule otherwise conclusive against him. But there underlies the whole subject of fixtures, a debateable point which in many cases has presented very great difficulty to the Courts—viz., the primary question whether or not this or that particular article is, in contemplation of law, a fixture at all. You will readily see that this is, in reality, quite a different matter to the question whether, conceding that the subject of dispute *is* a fixture, it may, nevertheless, be removed by a tenant; and I cannot help thinking that there is a good deal of confusion in the text-books on this point, and that the two things, which are quite separate and distinct, are often mixed up. You will find, if you analyse the authorities, that many cases cited in support of the proposition that certain fixtures may be removed really decide, not that they are fixtures which may be removed, but that they are not, in fact, fixtures at all.

I may just add, on this point, that the result of the authorities on the question of fixture or no fixture is well expressed in Grady on Dilapidations (p. 10), as follows:—

“Wherever a chattel is perfectly connected with the
“freehold, either by being let into the earth itself or by
“being cemented, or otherwise permanently united, to
“some erection previously attached to the ground, it
“becomes part of the freehold itself, and cannot be re-
“moved by the tenant.”

I think that I have now said enough as to the law on this subject to lead up to the practical consideration of the duties which it entails upon the solicitor of an intending lessor or lessee.

So far as the lessor is concerned, there is not much to be said. Parties may, of course, negative the general law in almost all cases, by contract, and there is no principle to prevent a lessee from engaging in terms that no fixtures shall be removed by him. But it may be said, I think, that generally speaking, and with a reservation possibly as to the provisions of the Agricultural Holdings Act, a lessor would not have any sufficient reason for insisting on rights of a more extensive kind than those which the law gives him in the absence of special contract; though, in fact, the provisions of a lease, as prepared, often have that effect. How far, on the other hand, the lessor's solicitor should assent to any provisions which the lessee's solicitor may be desirous of inserting in his client's favour on the subject of fixtures, is a question, the answer to which would depend entirely upon the special facts of the particular case.

Duty of
lessor's soli-
citor.

With the lessee's solicitor it is another matter. If your client is taking a lease of a private dwelling-house, there is generally no need to make any special stipulations in his interest, as the exceptions in favour of ornamental fixtures will sufficiently meet ordinary cases of this kind. But if he is taking a lease for purposes of trade or agriculture, or both combined, it is most desirable and right that you should, in his interests, thoroughly inform yourself as to what classes of fixtures there are or are likely to be, and you will then be able to determine how far the question of removal of fixtures may be material to your client, and will be guided accordingly in your perusal and settlement of the draft lease. Generally speaking, I think it may be said that the performance of this duty will take the form, not so much of inserting any special provision—though that may be desirable in exceptional cases, here and there—as of cutting down the language of the covenant into which it is proposed that your client shall enter as to the delivering up of fixtures at the end of the term. Not

Duty of
lessee's soli-
citor.

Wilson v.
Whateley.

unfrequently this covenant, as drawn, secures to the landlord a right to tenant's fixtures considerably in excess of that which the law would give him otherwise. As an instance of this, I may just mention the case of *Wilson v. Whateley* (1 J. & H. 436), in which a lessee was foolishly allowed to covenant to deliver up at the end of the term a number of specified articles, "and "other additions, improvements and things," which should be anyways fixed or fastened upon the premises. Vice-Chancellor Wood held that these general words did not find any restriction in the context, and that the lessee could not make a marketable title to articles in the nature of tenant's fixtures.

The sound rule to act upon in the lessee's interest is, I think, this—that you should in all cases resist, as far as possible, giving the landlord rights in excess of those which, by the law as it stands, are properly his, and that you should, whenever the circumstances call for it, stipulate on the lessee's behalf for whatever indulgence over and above his strict legal rights may fairly be asked for. You may not, of course, always carry your point, because these are open matters in which the lessor and his solicitor will have a voice, and you may be obliged to give way, wholly or partly, as a matter of discretion or necessity; or again, you may be tied by the terms of some preliminary agreement in the settlement of which you had no part; but I am suggesting to you what I conceive to be the right attitude for an intending lessee's solicitor to assume when dealing with questions of fixtures at the stage of settling a lease.

I need hardly say that where any given chattel is removable by the tenant, on the assumption that it is a fixture, it is a matter of indifference to both parties whether in the eye of the law it is or is not a fixture in fact; but the difficulty to which I just now referred, of deciding as to many things, whether they do or do not

fall under the heading of fixtures, may usefully be borne in mind in the lessee's interest, wherever it is desired that his right to remove any given species of chattel shall be clearly secured, and there can be the least doubt as to his right to remove it *quà* fixture. In such a case the lease should contain a provision giving him in express terms the right of removal which he wishes to assert.

I must not leave the subject of fixtures without drawing your attention to the need which exists for the exercise of special care and caution in the common case of your acting for a client who is taking a lease not direct from the freeholder but from a leaseholder—in other words, an underlease. In such a case it is the usual and proper practice for the lessor, for his own protection, to put your client under obligations and provisions exactly corresponding with those which the lessor himself owes to the superior landlord, and of course where this is in fact so, you will know that the provisions applicable to fixtures, as between your client and the underlessor, are consistent with the rights of the superior landlord, and that the latter cannot exercise any rights at variance with the terms of your client's lease. But although this is the usual it is not by any means the invariable practice, nor is there any implied obligation on the underlessor's part that the terms of the underlease are in harmony with those of the superior lease. It follows from this that the right and prudent course on the part of the solicitor for an underlessee is to satisfy himself as to the contents of the superior lease, and that his client will not otherwise be secure from danger. This observation applies, indeed, not merely to the case of fixtures, but also to the provisions of the superior lease generally, and although I should be misleading you if I were to assert that the practice in favour of an intending underlessee's solicitor overhauling the superior lease is well settled,

or even, perhaps, very usual; I am at least able to show you from the authorities, as to this special subject of fixtures, that the precaution certainly ought to be adopted, that great harm may come of omitting it, and that you will be wise to determine in your own practice to make a point of insisting upon it.

*Porter v.
Drew.*

The instance which I have in mind is a case of *Porter v. Drew* (49 L. J. R., Q. B. 482), and if ever you require to see the superior lease and are met by the objection that your requirement is unreasonable, I recommend you to refer the lessor's solicitor to that case for instruction and reproof. It appears from the report that the plaintiff, who was a nurseryman, had taken an underlease of a dwelling-house and nursery ground, in which underlease he had among other things covenanted that he would deliver up to the lessor all the landlord's fixtures which might at any time during the term be in or about the premises. Relying on the terms of his underlease, the plaintiff put up a number of greenhouses and other trade fixtures, and shortly before the expiration of his term he contracted to sell these fixtures. Thereupon the superior landlord immediately obtained an injunction to restrain their removal, and it was discovered by the plaintiff that the superior lease contained a covenant by the original lessees—the plaintiff's landlords, that is to say—to deliver up at the expiration of the term not only all the landlord's fixtures but also all trade fixtures annexed during the last seven years of the term of the superior lease. The plaintiff in his Statement of Claim declared that until the injunction was granted he knew nothing of this covenant in the superior lease, and, as the case was argued on demurrer, the truth of that assertion must for the purposes of the decision have been assumed. But the demurrer was allowed by Mr. Justice Grove. I will quote one short extract from his judgment which gives us the pith of his *ratio decidendi*. "None of the cases go the length of deciding

“that, because a person covenants for his own benefit
 “that certain things shall be done, he is therefore to
 “be taken to imply, not only that certain other things
 “shall be done, but that he will guarantee that the
 “landlord, or even others, shall not interfere. On this
 “broad distinction my judgment is mainly based.”

You will therefore see that, if in the superior lease some special stipulation has been made which is not repeated in the underlease—it may be about fixtures or anything else, but in *Porter v. Drew* it was a covenant which deprived the tenant partially of the right of removal of trade fixtures established by the authorities—the underlessee is liable to be seriously affected by such provisions, and is fixed with notice of the contents of the superior lease whether he, in fact, looks at it or not. This being so, it surely may be considered to fall within the duties of the solicitor for an intending underlessee to take care that his client shall not take harm from the provisions of the superior lease.

I propose next to carry you to the very important Repairs.
 subject of the obligations as to repairs as between landlord and tenant, and to adopt the same plan of endeavouring first to present to you a broad view of the law irrespective of special contract, and then to point out the duties which the solicitor for lessor or lessee should perform in the way of modifying the general law so as to give effect to the intentions or wishes of his client.

The general law may, I think, be thus expressed:—

First, as to the landlord—

The general
 law as to
 repairs.

In the case of an unfurnished house there is no implied contract on the part of the landlord either that the house is fit for the purpose for which it is let, or that he will do any repairs at all during the term (*e*).

(*e*) Woodfall on Landlord and Tenant, 12th edit. p. lxix.

In the case of a furnished house there is an implied contract by the landlord that it is fit for occupation, but not that he will do any repairs during the term (*f*).

Secondly, as to the tenant—

In the case both of an unfurnished and of a furnished house there is an implied contract on the tenant's part to commit no waste, to use the demised premises in a proper and tenant-like manner, and to keep them wind and water tight (*g*).

Thus you see that, with the exception of the implied warranty required from a landlord in the case of his letting a furnished house, the general law of England in this, as in the matter of fixtures and many other incidents, leans to his side, and in the absence of agreement relieves him from all liability, while it imposes, at all events, a qualified obligation as to repairs on the tenant.

In two leading features, however, our present subject differs from that of fixtures. In the first place, the law has not undergone any relaxation in the tenant's favour, except that the implied contract as to the fitness for occupation of a furnished house has only been completely established by modern decisions. And in the second place, the position of the tenant under the general law is very much more favourable than his position, as a rule, where the obligation as to repairs is defined by the contract between the parties. The burden in the way of repairs cast on a tenant by an ordinary repairing lease is a very different matter from the legal obligation to keep the demised premises wind and water tight.

In saying that I am, of course, only speaking of the general and approved practice, and not suggesting that there is any hard and fast rule. Lessors and lessees

(*f*) *Wilson v. Finch Hatton*, L. R., 2 Ex. Div. 336.

(*g*) *Woodfall on Landlord and Tenant*, 12th edit. p. lxix.; *Chitty on Contracts*, 8th edit. p. 313.

can make any contract they please as to repairs, and there is no rule of law to prevent an intending lessor from undertaking to do repairs, or an intending lessee from declining to come under even the ordinary liability for repairs attaching by law to him as tenant. It is, however, in practice a rare thing in the case of an unfurnished house in London for a lessor to come under any liability of a continuous kind as to repairs, although it is not unusual for him to engage to put a house into a specified state of repair, and sometimes, again, he may undertake the burden of external repairs during the term. On the other hand, in many, perhaps most, provincial towns, it is the general rule, and not the exception, for lessors to undertake the obligation of external repairs.

The obligations under which lessees usually come in the way of repairs is concisely expressed as follows in Woodfall on Landlord and Tenant (12th edit. p. 560), but I would just preface the quotation by saying that the passage can hardly be considered to be of general application, in so far as it deals with external repairs, elsewhere than in London:—

“Leases of houses, &c., usually contain a covenant
 “by the lessee to repair and keep in repair the demised
 “premises during the term; also another distinct cove-
 “nant to repair specific defects within a certain number
 “of months (usually three), after written notice thereof;
 “also to paint the outside and inside wood and iron-
 “work in a certain manner at stated times; and a
 “covenant to leave the premises in proper repair at the
 “end or other sooner determination of the term,
 “besides other covenants as agreed; after which usually
 “follows a proviso for re-entry on breach of any of the
 “covenants.”

Repairing
 obligations
 usually
 incurred by
 lessees.

The writer adds an observation, which I will also quote, because it gives me an opportunity of drawing your attention afterwards to an important provision of

the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41). He says of the proviso for re-entry:—

As to the
proviso for
re-entry.

“ In many cases, especially where a premium is
“ given, and in building leases, this proviso for re-entry
“ may well be qualified and limited to breaches occa-
“ sioning a specified amount of damage to the reversion
“ and inheritance, or to breaches after a certain notice
“ in writing, or to cases where damages in an action
“ for the breach have not been paid ; but it is commonly
“ made to apply to any breach of covenant whatever,
“ without due consideration on the part of the lessee as
“ to the possible consequences.”

The edition of Woodfall on Landlord and Tenant in which that observation was made had not been published for more than a few months when the Legislature stepped in to the tenant's aid and applied, not merely to some leases but to all leases, one of the alternative restrictions upon the proviso for re-entry which the writer suggested to be proper, and not only so, but declared that the provision should have effect notwithstanding any stipulation to the contrary.

How affected
by Convey-
ancing Act,
1881.

This alteration in the law was effected by the 14th section of the Conveyancing and Law of Property Act, 1881, which declares in effect as to leases executed both before and since the Act, that a right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition shall not be enforceable until and unless the lessor serves on the lessee a notice specifying the breach complained of, and, if it is capable of remedy, requiring the lessee to remedy it, and in any case requiring him to make compensation in money for it, and the lessee fails within a reasonable time to remedy the breach, if capable of remedy, and make compensation. The only qualifications appended to the section are, that it does not extend to a covenant or condition against assigning, under-

letting, parting with the possession, or disposing of the land leased; or to a condition of forfeiture on bankruptcy, or the taking in execution of the lessee's interest; or to certain specified covenants in mining leases.

Reverting to the short description which I gave you just now of the repairing provisions usually to be found in leases, you will remember that they embraced among others a general covenant to repair and a covenant to do specified repairs within a certain time after so many months' notice. Attempts were made in some cases to read these two covenants into one, and contend that a lessor could not proceed for breach of any covenant to repair until after he had given the notice. But the decisions (among others, a case of *Few v. Perkins*, 36 L. J., Ex. 54) clearly established that unless the two covenants were so connected with each other as to plainly carry that interpretation, they must be read quite distinctly, and that a lessor could, in fact, bring his action under one covenant without notice, or under the other with notice, as he pleased. I mention this because it gives point to the section of which I just gave you the purport, and you must bear in mind, both in construing old leases and settling new ones, that, no matter how peremptory the terms of the repairing obligations, the lessor cannot now, as formerly, avail himself of the proviso for re-entry until after the lessee has failed to comply with a notice such as the section describes.

Construction of double covenant to repair.

This being the state of the law and general practice as to repairs, what part should be played by the solicitors for the parties? Obviously, in the first place, to thrust as much obligation on to the other party and accept as little for your own client as you reasonably can. If you are acting for a lessor you will not, unless in exceptional circumstances, or where you are controlled by the custom of a district, accept for your client any liability for repairs at all, while you will insert in the draft lease all the repairing covenants which I have

Duty of lessor's solicitor.

described so far as they are appropriate to the subject-matter, and you will add any special covenants applicable to the particular circumstances.

Duty of
lessee's soli-
citor.

If, on the other hand, you are representing the lessee, your object will be to minimise his liability as much as possible. In saying that, I do not mean to recommend you to fight wind-mills. There is a certain recognized practice in most of these matters, and where it applies it is usually hopeless to resist it. For instance, if your client is taking a lease of a dwelling-house in London for twenty-one years, it is a matter of absolute certainty, unless a special and exceptional bargain as to the terms of tenancy has been made, that when the draft lease comes to you from the lessor's solicitor it will contain the ordinary covenants of what is called a repairing lease, and in cases governed by ordinary rules, you will have, for the most part, to content yourself with taking care to defeat any attempt to bring your client under extraordinary obligations. The cases in which there is, I think, most opportunity for tact and ingenuity are those in which the term is a short one, or the subject-matter is altogether out of the usual track of settled practice, or the lessor is to your knowledge sufficiently anxious to obtain a tenant to be disposed to grant your client lenient terms.

There is another practical point which I am anxious to impress on you, viz., that the language used to express the obligations on either side should be clear and explicit. Nothing is commoner than a dispute between lessor and lessee as to repairs which owes its origin to the ambiguous wording of the lease. This caution which I am giving you applies, of course, to the solicitors both of lessor and lessee, but it has, in degree, a more special application to the latter, because the cases decided upon expressions of doubtful meaning used in connection with a lessee's repairing obligations lean decidedly in favour of the lessor. As illustrating this, I may mention that a lessee who covenanted to repair, and

keep in repair, the demised premises during the term was held in one case to be liable to keep them in repair at all times during the term (*h*); and in another case to be liable to rebuild them if burnt down by accident, negligence, or otherwise (*i*). Again, a general covenant to repair, and leave in repair, was held to extend to all buildings erected during the term (*j*); and a covenant to keep premises in repair, and leave them in repair at the end of the term, was decided to mean that the lessee would, if necessary, put them into repair, because, otherwise, they could not be left in repair (*k*). These instances might be multiplied to any extent, but they will serve to show you that the language of repairing covenants has received a very liberal interpretation in favour of the lessor, and that the solicitor for a lessee must be on his guard to see that his client's liability is defined by the metes and bounds of precise accurate language, and that no loose ends are left upon which can be grafted any extended liability not contemplated or intended to be undertaken by the lessee.

My observations hitherto have been applicable, for the most part, to leases generally, but the points to which I am about to draw your attention have reference only to agricultural leases.

As to agricultural leases.

I have already mentioned, in connection with agricultural fixtures, the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61). Broadly speaking, the Act, in addition to its provisions as to fixtures, deals with the important subjects of tenants' improvements, notices to quit, and the law of distress. The provisions of this Act must have a material bearing upon every agricultural lease prepared after the date on which it came into force, and I would, in particular, point out to you that

Agricultural Holdings Act, 1883.

(*h*) *Luxmore v. Robson*, 1 B. & A. 584.

(*i*) *Clarke v. Glasgow Assurance Co.*, 1 Macq. H. of L. Cas. 668.

(*j*) *Dowson v. Earle*, 3 Lev. 264.

(*k*) *Payne v. Harris*, 16 M. & W. 541.

the right of compensation for certain improvements is given to tenants compulsorily; in other words, the statute forbids that the tenant shall be deprived of this right by contract. I strongly recommend you to familiarise yourselves with this important statute, both as lawyers and as draftsmen.

Custom of
country.

But the special features of agricultural tenancies do not stop here. For the relations between landlord and tenant are regulated upon the supposition that all *customary* obligations, not altered by the contract, are to remain in force. This has been settled law ever since the decision of the case of *Wigglesworth v. Dallison* in the reign of George III. (1 Smith's Leading Cases, 6th ed. p. 539), and it applies to a lease under seal just as much as to any other contract of tenancy, and is only affected by the Agricultural Holdings Act, 1883, in so far as the statute and the custom cover the same ground.

These customary obligations will be familiar to most of you under the expression "custom of the country," and their importation into leases, unless excluded in terms or by necessary implication, furnishes one of the most remarkable exceptions to the general rules of construction applied to written instruments. The wisdom of this exception has often been doubted, and many judges have assented to it with hesitation, but it has been too firmly settled by authority to give way to anything short of a statute.

The customs of the country vary considerably in different districts, and have changed greatly at different periods. Before 1848 the proof of the custom of each particular district was dependent upon tradition and oral testimony. In that year a Special Committee of the House of Commons collected all the available materials and presented an exhaustive report; and much more recently—in 1875—the Central Chamber of Agriculture published three reports on "Unexhausted

Improvements," one of which was accompanied by schedules showing the existing customs of the country in different districts. It appears from this report, that even in the interval between 1848 and 1875, the customs had in several places changed so much in character as to render the report of 1848 unreliable as a correct statement of the established customs at the later date.

I will not dwell further upon this matter, beyond impressing upon you that, so long as the law remains in its present state, whenever an agricultural lease is granted in a district in which any established custom exists, it will be your duty, whether as acting for the lessor or lessee, to satisfy yourselves as to what the custom is, and to consider how far, if at all, it is desirable to exclude it.

To those of you whose practice may lie in a particular district affected by custom, the customs of that district will soon, no doubt, become familiar as household words; but when any of us are dealing with a lease of property in a district with the customs of which we are not familiar, we must needs gain our information at second-hand, and in that connection I may add, that in the 12th edition of Woodfall on Landlord and Tenant, you will find on pages 727 to 731, and again on pages 739 to 750, tables made up from the schedules of the report to which I just referred, which show the customs prevailing in different parts of the country. You will also find in the same part of the volume some interesting extracts from the body of the report.

I have been dealing up to this point only with large general principles of law in their bearing upon the preparation and perusal of leases. I have not attempted, and do not propose, to consider the provisions either of ordinary or special kinds of leases, apart from the bearing of such principles, but there is one particular covenant not involving any special question of landlord and tenant law, to which I am anxious to refer, because it

Covenant
against
assignment.

still finds its way, almost as a common form, into many leases of all descriptions, and is open to the gravest objection in the interests of lessees. I mean the covenant which forbids the assignment, under-letting, or parting with possession of the demised premises without the landlord's consent. So favoured is this covenant, that the breach of it is one of the exceptions to the indulgence given to lessees, as to covenant, by the 14th section of the Conveyancing and Law of Property Act, 1881, to which I have already drawn your attention.

Its advantages to lessor.

Looking at the subject, first, from the landlord's point of view, it is not, perhaps, to be wondered at that he should be glad to have this covenant, because it gives him absolute control over the lessee in the matter of the persons to whom he permits the demised premises to be handed over; and control over other people is always sweet. Moreover, there may be—there often are—cases in which such a clause is really needful for his reasonable protection. Take, for example, the case of a furnished house. A man may be willing to let a house full of valuables to a tenant, of whose responsibility, integrity, and fitness in other respects, he has thoroughly satisfied himself, but it is quite another matter to give that person *carte blanche* to assign his tenancy to anybody he pleases. Many other instances may be supposed in which it may be desirable to secure this right of veto, and upon the whole, taking the practice as it exists, I cannot say that you will act wrongly in inserting such a covenant in a draft lease, when you are acting for a lessor, and particularly where the subject of the lease is a private dwelling-house—though I also think that, inasmuch as an original lessee always remains liable to the rent and covenants of the lease, no matter how often it changes hands, you may in most cases well qualify the covenant, even without pressure from the lessee's solicitor, by inserting the proviso which I shall presently mention.

As to the lessee, I can only say that, while there may be cases in which he may have to submit to this covenant, his solicitor should unhesitatingly and resolutely resist it wherever he can do so. It is calculated to depreciate the marketable value of the lease; it is restrictive of the right of alienation, which every lessee desires to enjoy, and may have every possible reason for exercising in given circumstances; and it places in a landlord's hands a weapon of which most unfair use may be, and, I am sorry to say, sometimes is, made in the shape of capriciously refusing consent or imposing black-mail of one kind or another as a condition of giving it. It is no exaggeration to say that lessees have in some cases been actually ruined by the refusal of the lessor to consent to an assignment of the lease or the underletting of the property. •

Its disadvantages to lessee.

The full rigour of the covenant is, in the present day, often much mitigated by adding to it a proviso, of which the substance is that the consent shall not be withheld in the absence of reasonable objection to the respectability or responsibility of the proposed assignee or sub-lessee, and sometimes it is added that no pecuniary consideration shall be required for it; but although the point has not been decided, the view expressed in Woodfall on Landlord and Tenant (12th edit. p. 628), that the qualifying proviso would of itself exclude a pecuniary consideration, is probably right.

Now often modified in its terms.

The effect of this proviso obviously is to restrict greatly the lessor's right to refuse his consent, and, indeed, I think it may be said that, wherever there is any reasonable ground for giving the lessor a voice in the matter of assigning or underletting at all, the covenant as so qualified is free from serious objection in the lessee's interests. But I would anxiously impress upon you that you will fall short of your duties to an intending lessee unless you resist to the very utmost

any attempt to put upon him an absolute unqualified covenant of this kind.

Observations
on special
classes of
lease.

With the exception of my brief reference to agricultural leases, the points which I have brought before you in these two Lectures are some at least of the most important of those to which every solicitor who prepares or peruses a lease of any sort should be thoroughly alive; but there are, of course, many practical points peculiar to special classes of lease. The subject-matters and purposes of leases are infinitely various. If you turn over the leaves of a published collection of precedents, your eye will light on a number of forms appropriate for leases of an ordinary dwelling-house, of a coal mine, of a farm, of building land, and many other subjects of leasing—extending even, in one rather elderly volume which I chanced to look at, to a lease of “a silver or free admission ticket “to the King’s Opera House for 16 years.”

Even leases of the same class of subject-matter will vary greatly in form and terms, according to the particular district in which the property is situated. A lease of a farm in one county may bear little resemblance to a lease of a farm in another county. A lease of a coal mine in South Wales will differ widely in form, if not in substance, from a lease of a coal mine in Staffordshire. There is no magic in any of these special classes of lease, and the degree of difficulty which any particular species will present to you will depend very largely upon the extent to which you may in practice have occasion to familiarise yourselves with them. It has chanced to fall to my lot to have something to do at odd times with South Wales mineral leases, and I well remember that the first one I came across appeared to me to be, without any exception, the most appalling and interminable instrument it ever was my lot to peruse. But the second did not alarm me nearly so much; and in process of time the various provisions of a

mineral lease became almost as familiar to me as those in a twenty-one years' lease of a dwelling-house. In the same way, if any of you have to do with agricultural leases in any particular locality, I make no doubt that you will very soon acquire the special knowledge of local custom and practice necessary for enabling you to protect the interests of your clients. It is with this as with everything else. We cannot acquire special knowledge by inspiration, but we can acquire it by patience and by determining to learn how to do thoroughly the work that comes to our hands, even though it be of more or less unfamiliar kind. And rest assured of this, that while you will never be really competent to prepare or peruse leases until you have mastered the leading general principles of the law of England as between landlord and tenant, when once you have thoroughly appreciated and taken them to heart, neither the tricks of expression or custom in a district, nor your want of familiarity with the special subject-matter of a lease, will be insuperable stumbling-blocks in your path, though they may trip you up now and then at starting.

FIFTH LECTURE.



	{	INTRODUCTORY MATTER.
	{	ANTE-NUPTIAL SETTLEMENTS OF REAL ESTATE:—
	{	RIGHTS OF HUSBAND AND WIFE IRRESPECTIVE OF SETTLE- MENT.
	{	OBJECTS AND FRAME OF STRICT SETTLEMENT.
	{	HOW AFFECTED BY LEGISLA- TION.
SETTLEMENTS.	{	ANTE-NUPTIAL SETTLEMENTS OF REAL ESTATE CONVERTED, AND OF LEASEHOLDS AND OTHER PERSONAL ESTATE:—
	{	CONVERSION—LEGAL AND PRAC- TICAL INCIDENTS.
	{	AS TO LEASEHOLDS.
	{	RIGHTS OF HUSBAND AND WIFE IN PERSONAL ESTATE IRRE- SPECTIVE OF SETTLEMENT.
	{	OUTLINE OF SETTLEMENT.

FIFTH LECTURE.

THERE is little difficulty in lighting upon a broadly-marked classification of settlements. From one point of view, they fall naturally under the headings of settlements of real estate and settlements of personal estate; and, from another point of view, they fall as naturally into the divisions of marriage settlements, or settlements for other valuable consideration, and post-nuptial, or, taking a wider area, voluntary settlements.

Classification
of settle-
ments.

I have experienced, however, considerable fluctuations of mind in deciding upon the best mode practically of presenting this subject to you. On the one hand, I have been oppressed with a consciousness of the fact that anything like an exhaustive treatment of the principles of law involved in a settlement of real estate would occupy a very much larger quantity of time than a correspondingly exhaustive treatment of the principles which affect settlements of personalty. Perhaps I could hardly illustrate this better than by mentioning that in the Introduction to Mr. Charles Davidson's *Precedents of Settlements* the observations upon the frame of a settlement of real estate occupy nearly 400 pages as against some 250 pages devoted to the corresponding subject of personalty. But then, on the other hand, strict settlements of real estate are, for the most part, confined to the comparatively small class represented by owners of large landed property; and for every one of these settlements which is likely to cross your path in practice you will, as I imagine, have to deal with a hundred settlements of personal estate, or of real estate

Treatment of
subject.

converted, for all practical purposes of the settlement, into personalty. And, again, whereas the preparation of a settlement of real estate is rarely, if ever, undertaken by a solicitor without recourse to counsel, settlements of personal estate are constantly prepared by solicitors without that assistance. It may therefore be said with truth that a knowledge of the incidents of the latter class of instrument is of far greater moment to the practitioner than a close acquaintance with the characteristics of the former.

I had at one time almost resolved to exclude strict real estate settlements altogether from my Lectures, but still further reflection has induced me to modify that view to the extent of inviting your attention very shortly to them during some portion of this Lecture, while dealing more at length with other classes of settlements.

I have said this much by way of preface, because I am anxious that you should understand the true reason for my determination, and not be misled into supposing that, as a matter of dry law, apart from any considerations of practical importance to yourselves, my mode of treatment rightly indicates the proportions as between the two classes of settlement.

One other observation by way of preface. I mentioned, as representing one primary division of settlements, those made in consideration of marriage, or for some other valuable consideration. I propose, in this division of my subject, to deal with the former of these classes of settlement alone, because, in the first place, of settlements made for valuable consideration ante-nuptial settlements form an immensely large proportion, and, in the second place, the observations which I shall make in treating of them, if shorn of special references to the relations of husband and wife, will cover, for all practical purposes, everything that I should propose to say as to settlements for other valuable considerations; in

other words, the major includes the minor. There may, of course, be here and there a settlement for some other valuable consideration than marriage, to which special characteristics would attach, but not in any such general sense as, in my judgment, to fall appropriately within the bounds of a Lecture aiming to present to you the broad thoroughfares of the subject rather than the side-alleys and unfrequented nooks.

It is, I think, important to bear in mind, as the starting-point of all marriage settlements, whether of real or personal estate, what the precise position of the parties would be as to the property proposed to be settled in the event of their marrying without making any settlement of it.

Legal position of husband and wife where no settlement.

Applying this simple test to real estate, the matter stands thus :—The intended husband may be owner in fee, or he may be tenant in tail, either in possession or expectant on the determination of some life estate, or his estate may be of some other character. But whatever may be the nature of his estate, one thing is certain—that, in the absence of any provision which may be made for her by express limitations in a settlement, the wife has no right or title whatever to her husband's real estate, either during his life or after his death, except the very slender interest represented by her claim of dower. This right, as you are no doubt all aware, was greatly curtailed by the Statute 3 & 4 Will. 4, c. 105, and only now arises in the event of the husband's intestacy, and in respect of real property to which he may have been entitled for an estate of inheritance in possession at the time of his death, and as to which, moreover, he may not have excluded his wife's dower by declaration in any deed, or by his will. I take it that a wife very rarely runs the gauntlet of such formidable obstacles, so as to succeed to this haphazard estate of dower; and as solicitors for an intended wife, I need

Wife's rights in husband's real estate.

Dower.

hardly point out to you that this is a fact which you should have prominently before your minds.

Freebench.

I ought just to remind you here that, in referring to the wife's position as to her husband's real estate, I have confined myself to property of freehold tenure, and that her rights as to property of copyhold tenure do not stand on the same footing, though there are strong features of resemblance. The analogous estate to dower in property of copyhold tenure is termed *freebench*, and, like all other copyhold incidents, it varies greatly in different manors. Thus, even its existence in any given case is dependent entirely on the special custom of the particular manor, and it ranges in degree over the following very different classes of interest:—

“In some manors the widow shall have the whole lands of which her husband died seised, and in others only a portion of them, as the moiety or a third or a fourth part. In some she shall have a portion of the rent and not of the lands themselves” (*a*).

There are some other distinctions between dower and freebench not sufficiently material to our purpose for me to dwell upon them here, but which you will find elaborately analysed in the second volume of Watkins on Copyholds, pp. 73—91.

Dower in
gavelkind
land.

Let me also reserve a saving clause in your minds for the special characteristics of dower in lands held by gavelkind tenure, viz., that it consists of a moiety, and continues only so long as the widow continues chaste and unmarried (*b*).

Husband's
rights in
wife's real
estate.

Turning to the wife's real estate, the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), gives us the key to her own and her husband's relative positions at once. The second section of that Act declares (among other things) that every woman who

(*a*) Watkins on Copyholds, Vol. II. p. 87.

(*b*) Williams' Real Property, 13th edit. p. 236.

marries after the commencement of the Act shall be entitled to have and to hold as her separate property and to dispose of all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage.

The first section of the same Act (sub-sect. 1) throws light upon the meaning to be attached to the expression "separate property," as used in the Act, by providing that a married woman shall, in accordance with the provisions of the Act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate estate, in the same manner as if she were a *feme sole*, without the intervention of any trustee.

Before the passing of this statute, and subject to the limited operation of provisions in the earlier Married Women's Property Act of 1870 (32 & 33 Viet. c. 93) which it repealed, the husband would, in the absence of a settlement, have been entitled to a freehold estate in his wife's lands during the joint lives of himself and his wife. That estate is clearly destroyed by the statute. He would further have been entitled, on her death, to a life curtesy estate in his wife's freehold land of inheritance, provided he survived her and had had issue by her born alive and capable of inheriting. There is a difference of opinion as to whether that estate also has vanished altogether; but as the statute says that the wife is to hold and dispose, by will or otherwise, of her real estate as a *feme sole*, it is at all events quite clear that she can now defeat her husband's curtesy estate, either by conveyance in her lifetime or by will; and the only doubt—a doubt which, in the absence of any decided case, I will not attempt to solve—is, whether the husband would be deprived of the estate where the wife dies without availing herself of her powers of disposition.

Of the husband's curtesy estate in copyholds, it is

Curtesy
estate in
copyholds.

observed by Mr. Watkins (*c*) that, like the widow's estate of freebench, it is claimable only by special custom, and that consequently it must equally belong to such custom to regulate it both as to its quantity and duration.

Practically, therefore, in the absence of a marriage settlement—and remember that I am confining myself entirely to the marriages of to-day and am excluding marriages in the past tense--the wife has only a very shadowy interest in the husband's real estate, and the husband has no interest at all in his wife's real estate ; and it is upon this state of things that the provisions of a settlement operate.

Strict settle-
ments of real
estate.

Their object.

To sum up in the fewest possible words the primary objects of strict settlements of real estate, it may, I think, be said generally that they are to keep the settled property in the family, to uphold the custom of primogeniture, and to secure by charges on the estate some provision at least for those members of the family whose interests are subordinated to those of an eldest son. The attainment of the first of these objects is largely imperilled no doubt by the powers of sale conferred by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), on limited owners, but none the less is it still an object almost invariably in view when a strict settlement is made.

Their con-
tents.

Passing from the objects to the contents of the instrument, there is scarcely a recognized provision in settlements of real estate to which a chapter in legal history does not attach in the shape of its recalling the development of some equitable doctrine round which a strenuous contest fiercely raged, perhaps, between the Courts of Common Law and Chancery, or some statute representing a land-mark in the gradual process by which the freedom of disposition of land has been gained, or again a restriction found necessary for pre-

venting the abuse of that freedom. But, with the exception of the recent changes wrought by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and the Settled Land Act, 1882 (45 & 46 Vict. c. 38), of which, however, the former has only a comparatively slight bearing on settlements, the history is not very modern history, and a settlement of real estate executed just before the passing of those Acts differed very little in principle or framework from a settlement executed forty years ago. Thus, the conveyancer who perused such a settlement would expect to find it of almost interminable length, and that it would contain a series of limitations, partly freehold, and partly of long terms of years created for the purposes of raising jointures and portions for younger children, and so forth; and he would not be surprised to see that by means of a shifting use the condition of taking or keeping a particular family name was imposed on the objects of the settlement, or that by the same means some other object had been attained—as, for instance, a modification of the provisions of the deed in some specified contingency, such as a second marriage and birth of issue of that marriage; and he would further look to find such powers as powers to manage, to lease, to enfranchise, and to concur in a partition. These limitations and powers would of necessity differ according to the nature of the title and property and the extent to which in any particular case it might have been desired that the limitations should embrace collateral family branches, but the general scheme and groundwork of such settlements were thoroughly rooted when the Settled Land Act, 1882, came into force.

I do not propose to consider at any length the provisions of that important statute, but my present Lecture would obviously be very incomplete without some brief reference to it.

How affected
by Settled
Land Act,
1882.

The general purpose of the Act is stated by Messrs.

Wolstenholme & Turner (*d*) to be to give to an owner for the time being having a beneficial interest in land under a settlement, whether the subject of settlement be an estate in fee simple or a less estate, power to dispose of or deal with the land, or the estate or interest therein which is settled, so as to turn it to the best account, in the same manner as if he were a prudent owner absolutely entitled to the subject-matter of the settlement, and having complete power of disposition; care being at the same time taken to preserve the corpus of the property for the benefit of the successors in title of the owner for the time being.

Looking to the fact that these extensive statutory powers are not allowed by the Act to be modified by contract, you will readily suppose that they almost necessarily carry in their wake, in the case of a real estate settlement prepared to-day, some alteration in the well-worn model of those instruments, and such is undoubtedly the case. But I think you may take it that the statute has affected rather the legal consequences than the draftsmanship of real estate settlements, except in so far as it has resulted in the addition to them of clauses having special reference to the contingency of a statutory sale, and the mode of investment of the purchase-money, while both this statute and the Conveyancing and Law of Property Act, 1881, operate upon settlements in this way, that many of the subsidiary provisions formerly expressed may now be left to statutory implication, and that they will also be affected in point of length by the more concise mode of expression in draftsmanship, generally, which has been inaugurated by this legislation.

I do not propose to bring before you, even in the most general way, the outline of a settlement of real estate, for the double reason that it would serve no

(*d*) Wolstenholme & Turner's Settled Land Act, 1882, p. 1.

sufficiently useful purpose, and would occupy far too great a proportion of my Lecture. You will find, however, in the Introduction to Mr. Davidson's *Precedents* (*e*), an excellent sketch of such a settlement as it was before the recent Acts, and a careful perusal of that outline, followed by a comparison of it with one of the forms of real estate settlement to be found among the *Precedents* at the end of Messrs. Wolstenholme and Turner's book on the Settled Land Act, 1882, will enable you to appreciate the frame of this class of instrument better than anything I could say; always supposing that you have first grasped the general elementary principles applicable to real estate, and have also studied carefully the statutes to which I have referred.

The preparation of a settlement of real estate is, as I said at the beginning of my Lecture, rarely, if ever, undertaken without the assistance of counsel; and the remark obviously applies, with additional force, at the present moment when the art of draftsmanship of such instruments is affected by legislation so novel in principle and so important in result. But I must not omit to lay stress on the fact that, apart from all technicalities of draftsmanship, there must always be room for the qualities of tact and judgment in so far as actual tangible results are concerned. The mode of securing pin-money, or a jointure, or both, for the wife, or portions for younger children, is well ascertained, and will naturally be left by the persons interested to those professionally concerned. But the amount of the pin-money, or jointure, or portions for younger children, is another matter altogether, in which your client, whether paying or receiving it, may reasonably be supposed to take an intelligent, not to say lively, interest. Again, the technical language used for assuring the successive limitations of interests in the settled property is quite

The solicitor's functions as to real estate settlements.

(*e*) 3rd edit. Vol. III. pp. 272—275.

beyond the comprehension of a lay client; but the parties to the marriage, or their parents, will have a keen appreciation of the question whether the husband or wife is to have the first life interest. It is in the collection and accurate statement of all material facts and in the adjustment of such matters as those to which I have just referred, rather than in the actual draftsmanship of a settlement of realty, that the solicitor's part is generally played, and there are some few practical considerations attaching to the performance of these duties, which I may very shortly mention.

One very important matter will obviously be precise and accurate information as to the real estate to be put into settlement and the exact nature of the title to it.

Investigation
of title—how
far to be
carried.

Now the mention of title in this connection puts me in a difficulty. There can, of course, be no question that the exact nature of the estate proposed to be put into settlement by the husband or wife should be ascertained—whether, for instance, it is a fee simple or an estate tail, and if the latter, whether or not in possession, and whether the estate tail is to be barred or not. All that we may take for granted; but my practical difficulty is in advising you soundly as to the extent to which it is right and proper for the solicitor of either party to investigate the title of the other party to real estate proposed to be brought into settlement. I may add at once that the point with which I am now dealing covers equally real estate brought into strict settlement and real estate brought into settlement as personalty, and of which I shall presently have occasion to speak.

We will suppose that real estate is brought into settlement by the gentleman, and personal estate of substantially equivalent value by the lady, and that you are acting for the lady. The marriage contract broadly takes, we will say, this form—that both parties contribute equally to the settled property, and that your

client or her parents settle 10,000*l.* because the husband settles an estate of that value, and *vice versá*. The one is the consideration for the other. Now, if the lady, instead of marrying, were to invest the 10,000*l.* in the purchase of the same real estate, you would of course investigate the title to it in the ordinary way as between vendor and purchaser. How, then, should you act when, instead of buying the real estate, she is settling her money upon the faith that the gentleman owns such an interest in the real estate as enables him to bring it into settlement in the agreed manner? The Court answers this question by saying that in principle there is no distinction between the two cases in the measure of a solicitor's duties. I am not aware that the express point has ever formed the subject of decision in an action for negligence, but opinions in the sense which I have just indicated have certainly been delivered from the Bench. To take an example—in a case of *Wormald v. Maitland* (13 W. R. p. 832), in which the question at issue was one of constructive notice, the late Vice-Chancellor Stuart made the following observations incidentally:—

“It has been said that on these occasions”—the making of marriage settlements—“it was not usual to “ be so cautious or so careful as on the occasion of a purchase. That was a very dangerous doctrine, and not “ one which he could countenance for a moment. The “ consideration of marriage was of the highest kind, “ even higher than that of money paid on a purchase. “ As to the usage, he desired that there should not be a “ doubt as to his opinion. It was a gross neglect not “ only not to see the deeds and compare the abstract “ with them, but a still grosser neglect not to have the “ custody of them secured.”

The legal responsibilities of a solicitor are heavy enough in all conscience without his voluntarily adding to them; but in spite of everything that all the judges

on the Bench may say, I am persuaded that it has not been, it is not, and it is not likely to be, the *practice* of the profession to subject settlors to the cost and trouble of an investigation of title corresponding in all respects to that between vendor and purchaser. The relations of the parties are not—at least I hope so—in actual fact equivalent to those of vendor and purchaser, and a solicitor may very speedily find himself placed in a position of extreme delicacy and awkwardness if he presses his requirements of evidence of this or that statement beyond a certain point.

The solicitor's
right course.

On the other hand I see no reason whatever why the responsibility in such matters should rest on the shoulders of the solicitor to the relief of the client. The Court says to the solicitor, "It is your duty to do this. If you do not do it and harm follows, you will be held guilty of negligence." I answer, "Very well, then, Court. I will either do it, or if I fall short of doing it, it shall be because my client, after being made aware of what you have declared to be my duty, and after being put in possession of all the facts necessary for enabling him to form a judgment, has declared that I am not to go beyond a certain point, and that he holds me harmless of any consequences which may result from my stopping short at that point."

In that imaginary answer lies the best advice that I am able to give you. Of course I need hardly say that your client's decision will generally be largely coloured by your own advice, and that you cannot, therefore, shrink from forming an opinion yourself as to what is a reasonable and proper length to which the investigation of the settlor's title should be carried. It may, I think, be said as to this, that the settlor's solicitor should furnish reasonable evidence of title and not ask your client to take any really important matters for granted. Thus, an abstract of title may fairly be asked for, and it may also fairly be required

that it shall be verified by production of deeds and so forth, in the usual way; but with regard to the length of time to which the abstract should be carried back, I think that, unless for some special reason, your client might be reasonably contented in many cases with something short of a purchaser's requirements. Suppose, for instance, that the title has been subjected to a critical investigation on the occasion of a purchase or mortgage some years since, I think that the result of that investigation might properly be accepted as a starting-point. Or suppose again, that the settlor's interest is derived under some family settlement of the property—here an abstract of that settlement would probably meet the reasonable requirements of your client. Again, the requisitions, if any, may, I think, properly stop short of many of the comparatively minor matters usually to be found in a set of requisitions delivered on behalf of a purchaser.

In forming your own judgment, look at the matter in a broad spirit, take all circumstances into account, and if, as the result of doing so, you arrive at the conclusion that all reasonable purposes will be served by something short of what the Court requires at your hands, then place the matter before your client, explain clearly how it stands, and let him decide whether you are to comply with the letter of the law, or make some abatement from it, at his risk and not at yours. That is the best opinion I have been able to form as the result of my own limited experience and of enquiries which I have made of some of my professional brethren in whose judgment I have great confidence. I will only add that the familiar adage *litera scripta manet* may usefully be borne in mind when you are taking instructions of which the effect is to relieve you from personal responsibility.

Assuming this point to be got over in the case of a
 strict settlement of realty, and that it is thoroughly

Negotiation
 of terms of
 settlement.

known what interest in what property is to be brought into settlement, there will next come the crucial question of what are to be the terms of the settlement.

As I said at the commencement of my Lecture, strict settlements of real estate are made for the most part by large landed proprietors, and in the majority of cases the settlement falls within a groove in which even the adjustment of the amount of the pin-money, jointure, and portions for younger children is more or less concluded by family traditions. Should these or similar matters, however, be open for discussion to the fullest extent by the solicitors, they will call for the exercise of tact and delicacy. The relative values of the property brought into settlement by the parties will of course be a material element in such a discussion. Real estate possessed on one side may be balanced, or more than balanced, by real or personal estate possessed on the other side; or, on the other hand, the property may be all, or nearly all, on one side. The limitations of the settlement will naturally be coloured by the facts in this important respect. Then again, it may be, and often is, the case that the settlement embraces some sacrifice or gift on the part of the parents of one or both of the parties—as, for example, where the husband is tenant in tail expectant on his father's life estate, and the father joins in barring the entail in order to allow of a re-settlement by which the father's life estate is preserved, but an immediate income of some kind is charged on the property in favour of the son. With reference to this particular illustration, it is observed truly in Mr. C. Davidson's *Precedents* (*f*), that it is one of the most delicate functions of the conveyancer to advise, as he is sometimes called upon to do, as to what are fair terms between father and son upon the re-settlement of the family estate.

(*f*) 3rd edit. Vol. III. p. 276 (note).

I have not dared to do more than indicate in the most cursory manner these matters of negociation as applied to settlements of real estate, because I have much to say upon subjects more within the everyday reach of a practising solicitor; but I would just add this, that, although, strictly speaking, the duties of conveyancing counsel are limited to draftsmanship and to advice on points of actual law, yet, by reason of their experience in such matters, counsel in large practice attain to a special knowledge of the usual provisions of strict settlements of real estate which enables them often to advise as to matters of considerable delicacy, partaking rather of the nature of negociation and adjustment of terms than of strictly technical guidance, and a disputed or doubtful point may often be adjusted satisfactorily by recourse to the judgment of a learned conveyancer.

I turn with relief from a subject which has not appeared to me to be capable of being handled greatly to your practical advantage, from my special point of view, to one with which you have all need to be familiar—I mean marriage settlements of real estate turned into personality by means of the equitable doctrine of conversion, and of leaseholds and other personal estate pure and simple, or partly of the one and partly of the other kind of property. For most purposes these may be classed together as settlements of personal estate, but it will clear the way if I say just a few words as to the distinctive features of the former.

However much the character of personality may, by the aid of artificial doctrines, be stamped upon that which is in actual bodily fact real estate, there must of course be certain fundamental differences between the mode of dealing with them. It may be declared and intended that real estate put into settlement shall be sold, and from the moment of its being sold and paid for it will become in fact, as before in theory,

As to real estate settled as personality.

personal estate. But there will of necessity be some interval between the dates of the marriage and of the sale, and there may be weighty reasons for prolonging that interval indefinitely. It follows that, while the interval lasts, the property will be in the hands of the trustees, and that they should, generally speaking, be in a position which will enable them, if need be, to let it, to repair it, and generally to exercise over it such powers of management as may be conducive to the interests of the beneficiaries, and, furthermore, to deal with the rents which come to their hands. The mode in which this result is usually attained is to convey the real estate to trustees upon trust to sell it when requested to do so by one or more of the beneficiaries (commonly the life tenant for the time being), and to hold the proceeds of sale, and the rents and profits pending sale, upon the trusts declared by another deed of even date, with powers of leasing until sale, exercisable with or without concurrence on the part of any beneficiary, as may be thought fit. By the separate deed, which may also comprise trusts of other property, and is, in fact, the settlement, these trusts are accordingly declared. The reason for effecting this object by two deeds is that it keeps the title to the real estate clear of all trusts and relieves a purchaser from any necessity for inquiring into the disposition of the purchase-money by the trustees.

Settlements of
leasehold
property.

The mode of settling leasehold estate intended to be sold bears a close analogy to that which I have just described, because, although the doctrine of conversion has no application technically to leaseholds, which are already personal estate, the practical considerations attaching to the selling, letting, and dealing with the rents and profits until sale are the same, and need the same manner of treatment.

There is, however, one important point connected with leaseholds to which I would direct your special attention. The difference in value between a lease-

hold interest held for a long term of years at a low ground rent, and a freehold interest, is not usually considerable; but, whereas the latter ownership has no limit of duration, the former is constantly wearing out and drawing to an end. If the end be 999 years distant, it will hardly furnish much of the enjoyment of anticipation to the reversioner, but suppose that instead of the term having 999, it has only 30 or 40 years to run, you will see at once that the interests of the life tenant and those of the ultimate beneficiaries may be by no means identical. The life tenant may be very well content to go on in the receipt of a high rent in the comfortable assurance that the property will last out his time, and may be by no means in a hurry to sell. But this will mean that, in addition to the income of the settled property, he is really getting a slice of the capital every year, and that if he lives long enough the other objects of the settlement will reap no benefit at all. It is obvious that in such a case the true relations of income and capital can only be preserved by promptly selling the property and investing the proceeds in personal securities. I may just illustrate this observation by a passage in Lewin on Trusts (*g*), which applies in terms to wills, but the reasoning of which is quite in point. It is this:—

“As a general rule if a testator gives his personal estate, or the residue of his personal estate, or the interest of his property, in trust for or directly to several persons in succession, and the subject of the bequest is of a wasting nature, as leaseholds, long annuities, &c., the Court implies the intention that such perishable estate should assume a permanent character, and so become capable of succession. The Court accordingly, in these cases, directs a conver-

“sion into Three per cent. Bank Annuities, and
“trustees and executors are bound to observe the
“same rule in their administration of property out
“of Court, and if they fail to do so will be liable
“as for a breach of trust. But an intention that the
“property should be enjoyed in specie may appear
“from the form of the bequest or be collected from
“the terms of the bequest.”

The principle here enunciated as to leaseholds I take to be as applicable to settlements as to wills. It follows that, whenever leaseholds are made by a settlement the subject of enjoyment by successive persons, and a trust for sale is impressed upon them, the instrument should clearly show upon what, if any, request or approval of beneficiaries the sale is to hinge, and what is to be the mode of disposition of the rents until sale.

Such matters as these are essentially subjects for arrangement, and it may be that, when all the circumstances are taken into account, the plan of suffering the rent of any given leasehold property, however short the term may be, to be received by one of the beneficiaries until sale, and even to delay the sale during the life of the beneficiary who is in the enjoyment of the rent, may be not open to any objection. I am only anxious that you should all be acutely alive to the circumstance that, in respect of permitting the life tenant to receive the rents as income of the trust property until sale, the analogy between freehold and leasehold property is never actually perfect in theory, and may in some circumstances not exist at all by reason of the radical difference between the two classes of interest represented by those tenures.

With regard to leaseholds as a subject of settlement, the word “lease” necessarily carries with it obligations great or small, and, both for the protection of the trustees and in the interests of the beneficiaries, care should always be taken to provide means for the pay-

ment of rent and performance of covenants until sale as a primary part of the scheme of the settlement.

Sometimes, indeed, the nature of the lease may render it desirable for the protection of the trustees to adopt the special course of settling it by way of underlease, so that the trustees may not be drawn into the legal obligations to which assignees of a lease are subject. This method and the reasons for it are well expressed in a note which I have found in an edition of Bythewood's *Precedents*, published in 1833 (*h*), and I will quote it, partly because it is not of great length, and partly because it is a refreshment in these days to find any law fifty years old which still holds good. The writer says:—

“ Where the leaseholds about to be settled are subject
“ to a rent and covenants of an onerous nature, it is
“ advisable to make the settlement by way of under-
“ lease in order to exempt the trustees from the liability
“ which they would incur by taking an assignment ; but
“ this is a practice not proper for universal and indis-
“ criminate adoption, being productive of inconveniences
“ which indeed may be outweighed by the propriety of
“ protecting the trustees, but ought not to be incurred
“ without occasion. Whenever the settlement is by way
“ of demise it should be distinctly shown that the rent
“ and covenants of the lease are to be discharged by the
“ grantees, because otherwise there is reason to contend
“ that they, as underlessees, are entitled, as between
“ them and the settlor and his representatives, to take
“ the property free from the obligations of the lease—
“ or, in other words, to call on the lessor to save them
“ harmless under the implied warranty resulting from
“ the words of demise, which is never the intention of
“ the parties.”

(*h*) Vol. IX. p. 187.

Settlement of
other per-
sonal estate.

I have directed your attention to these few matters which relate specially to freehold and leasehold property as subjects of personal estate settlements, because I have thought it better to point them out at starting rather than to interrupt the general thread of what I have to say upon that class of settlements; but I will ask you, for the purpose now in view, to consider both freeholds converted into personalty and leaseholds as merged into and not distinguishable from other personal estate.

Their general
characteris-
tics.

I mentioned at the commencement of my Lecture that strict settlements of real estate are for the most part made by large landed proprietors anxious to keep up a family name and estate. No such class peculiarity applies to settlements of personal estate. They are made by people in all sorts and conditions of life. They embrace all grades, from the settlement made on the marriage of a young couple about to start in life upon the strength of a policy of life insurance belonging to the intended husband, and a small reversionary interest belonging to the intended wife, which may probably come into possession about thirty years hence, to the settlement made on the marriage of a couple who, to use a homely expression, are rolling in wealth.

Points for
preliminary
consideration.

Now, looking to this fact, I take it that the first duty which a solicitor owes to his client is to consider carefully the situation in life and relative means of the parties, and in particular the nature of the husband's occupation.

If all, or the bulk of, the property is settled by the husband the provisions of the settlement will naturally lean in his direction; and if the converse is the case, the converse will be the result. But whatever may be the disparity of means, it may, I think, be fairly taken that by the act of marriage the parties interested assume to each other a relation in which the object of

making a settlement should be to make suitable provisions for the husband, wife and issue of the marriage, according to the means available for settlement, and in default of issue to restore the corpus ultimately to the source from whence it originally proceeded. And there is one piece of advice which I would impress upon you as applicable without distinction to all marriage settlements, that what is right and just—and even, it may be, from a dry business point of view, generous—is best and wisest in the end for all parties, and that it is no part of a solicitor's duty to seek for his client, and that it is his duty to resist firmly on his client's behalf the taking of, any undue advantage.

Great as is the need for tact and judgment on the part of a solicitor in many of the duties which he is called on to perform, the exercise of these qualities is perhaps as pre-eminently needed in the negotiation of a marriage settlement as in any other kind of business that falls to his lot.

Need of tact
in negotia-
tion.

The intended husband and wife are usually, though not invariably, disposed at that particular period to look upon such prosaic matters as settlements with indifference, if not with actual disgust; but there are generally, and very properly, parents or friends in the background who champion their interests and strike the bargain embodied in the settlement: and it is a matter of common experience to lawyers that many proposed marriages are broken off in consequence of a dispute arising upon the adjustment of the terms of the marriage settlement.

Now I am very far from tracing these fiascoes altogether, or even principally, to the solicitor's door. No one has yet, I think, attempted to fix solicitors with responsibility for the pride or poverty or avarice of their clients. But at the same time I have had occasion sometimes to think that solicitors do not always exhibit the tact and taste essential for dealing with such delicate

matters. Take the case, for instance, of a projected marriage where the lady is not in a position to make any contribution to the settled property. In such circumstances the one-sidedness of the means will naturally have an effect upon the provisions of the deed, and the terms will be more or less dictated by the advisers of the gentleman. But sometimes the advantage taken of the situation on the gentleman's side exceeds the limits of reason and even of common propriety; the fact that the lady has been thought worthy to assume the position of his wife is lost sight of, and provisions are insisted upon which excite just resentment on the part of the lady's friends and advisers. Reverse the example, and the observation applies at times with still greater force. Not only is the property of the intended wife sought to be securely tied up beyond the reach of her husband, but over and beyond that provisions which place upon him positive humiliations are strenuously supported.

I am speaking, remember, of the many cases in which a solicitor does in fact exercise an important influence in the matter. He may of course have no option but to carry out instructions which are at variance with his own personal views; his opinion may be overruled, or may not even be asked for: and it is an old saying, available of course as a rule of conduct only up to the point at which self-respect makes its appearance, that a client is always right. But, on the other hand, the solicitor's advice may be, and often is, not only invited but implicitly followed, and where this is the case I would impress upon you that zeal for your client's interests should, like everything else, have limits founded on justice and right feeling, and that your duty does not, and never can, demand of you that you should voluntarily outstrip those limits.

So much as to the general aspect from which, as it appears to me, the negotiation and preparation of marriage settlements should be approached. Let us now

look into the matter somewhat more particularly, and consider first how the parties stand in the absence of a settlement, and then some of the points which arise where a settlement is made; and let me once more say that, except where I invoke the past by way of contrast with the present law, I speak only of marriages taking place, as it were, now, because I am dealing with the duties which attach to the solicitor who prepares or peruses a settlement to-day.

Treatment of subject in detail.

The rights of a husband in the personal estate of his wife were formerly paramount, and contrasted remarkably with his small stake in her real estate—a fact which was well demonstrated by Mr. Joshua Williams in his work on *Personal Property* (i), in the following observations, among others:—

Rights of husband in wife's personality where no settlement.

“The husband's rights in his wife's property still materially vary according as it may happen to be invested in real or personal estate. If it consists of real estate he has only a life interest as tenant by the curtesy, provided he has issue by his wife born alive, who might by possibility inherit as her heir. If it be personal estate he has a right to appropriate to himself all that he can lay hands on. Again, the real estate of the wife is protected from alienation by the most careful provisions But in all cases not within the Act” (20 & 21 Viet. c. 57, which rendered the wife's acknowledgment of the deed necessary where she released her equity to a settlement, or assigned her reversionary interest) “the assignment of her personal estate, if made at all, can only be made by her husband, and her concurrence or objection is quite immaterial.”

In the course of his observations the writer expressed his disapproval of the difference in the legal principles applicable to the husband's right to his wife's real and

(i) 6th edit. p. 363.

personal estate ; but he probably would have scarcely ventured to predict that, very soon after he had laid down one of the ablest pens that ever contrived to infuse something of life into the dry bones of law by the aid of attractive literary composition, an Act would be passed which would reduce the husband's rights to zero both in his wife's real and personal estate.

Such, however, as we have seen, has been the case, and the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75) has given the wife complete ownership of and dominion over her real and personal estate during her life, and full powers of testamentary disposition at her death. It has even been gravely doubted whether, when the wife does not exercise her testamentary power, the Act has not swept away the husband's right to administer to his wife's effects and stand in the position of her next of kin. An eminent conveyancer has, I believe, advised that the statute does produce this startling result, although I think the balance of opinion leans the other way. The point can only be set at rest by a judicial interpretation of the first section of the Act (sub-sect. 1) read in connection with the second section.

Settlement
still desirable
for wife and
children.

Upon the law as it now stands it may be asked with some colour of reason what need there is for tying up the wife's property by settlement at all if it be made separate estate by the Act, and is free alike from the husband's control and his debts. But whatever the statute may have done in the way of freeing a wife from her husband's legal control, no legislation can protect her from his persuasion or the weight which his position gives him in her eyes ; and the intervention of trustees, by whose impartial and independent hands the wife's settled property will be dealt with in accordance with trusts devised for the mutual benefit of herself, her husband and her issue, must ever remain a wise and salutary measure of protection, unless indeed the change

in the relations of husband and wife with regard to the ownership of property should lead to a social reversal of their positions—in which case we shall perhaps have to turn our attention to protecting the husband's property from the debts, control, and engagements of his wife.

With regard to the wife's interest in her husband's personal estate, it is and always has been *nil* during his life, except in so far as her right to be supported by him is concerned, while, in the absence of his making a will, she is entitled, under the Statutes of Distribution, to a third share of her husband's personalty if he leaves children, and to a half share if he leaves no children. This, as you will observe, is a much more tangible right than that of dower in real estate, but resembles that right in that it leaves the wife entirely at her husband's mercy.

Wife's rights
in husband's
personalty.

Applying this state of the law to the practical duties of a solicitor acting for either party to an intended marriage, and bearing in mind that, marriage being a valuable consideration, an ante-nuptial settlement can very rarely be upset by creditors, you will, I think, have no difficulty in arriving at the conclusion that a properly-framed marriage settlement is generally most desirable in the interests both of husband and wife where there is any property in possession or reversion to settle. If all goes well the settlement is rarely a burden or restraint on the due enjoyment of the settled property, while it may be of incalculable value in times of disaster and difficulty.

Having reached this point, I propose to bring before you a sketch of an ordinary settlement of personal estate, with some few comments upon its provisions.

Outline of
ordinary
settlement of
personalty.

The first matter, I need hardly say, is to vest the settled property securely in the trustees, and the mode of doing this must, of course, depend entirely on the character of the property. We have seen that, in the case of real estate settled as personalty, the approved

Vesting of
settled
property in
trustees.

device is a conveyance of it upon trust for sale. If the property consists of bonds payable to bearer, it is obvious that the delivery of the bonds into the custody of the trustees will answer all purposes, while if it be inscribed stock or shares in a company, the transfer will be in the approved ordinary method of dealing with such securities. In the three cases which I have last supposed, and in others falling in the same category, the settlement will contain no operative words of transfer, but the recitals will refer to the transfer as an accomplished fact, or as an act about to be done, and the operative part will consist of a declaration of the trusts on which the settled property is to be held.

It may be, however, that the nature of the property settled, or the title to it, may involve (not only in the case of real or leasehold estate, but in the case of other classes of property) the insertion in the settlement of operative words of assignment, and in some cases, also, the execution of a deed of appointment, immediately preceding the actual settlement. A common instance of this occurs where all or part of the settled property consists of a reversionary interest held upon the trusts of a settlement or will, under which one or both of the parents of the intended husband or wife have a power of appointment among children or issue. We will suppose, for example, that the mother of the intended wife is in receipt of the income of a trust fund, which, on her death, will go to her children or issue in such shares as she and her husband may appoint by deed, or she may appoint by will, and failing appointment, equally between them. The intended wife may be one of six children, and it may be arranged as a term of the marriage settlement that the parents will exercise their power by appointing a sixth share to her in contemplation of her marriage. To give effect to this, they will execute a deed of appointment, and the intended wife will, by the settlement, assign to the trustees the appointed share. The two instruments

will of course be executed almost or quite simultaneously, and the assignment will be made complete by giving notice of it to the trustees of the instrument under the powers of which the appointment has been made.

Upon the mention of that word "notice" I may hinge a piece of advice which comes in appropriately at this point, because it has a direct bearing upon the operation of vesting the settled property in the trustees. In the equitable doctrines relating to ownership, the question of notice plays often a most important part, as it also does under some statutes relating to particular species of property; and there is no commoner expression in text-books than that of "purchaser for value without notice." It would be impossible for me to analyse the doctrine of notice or the statutes from which in some cases it derives its existence; but in truth it is a matter as to which the exercise of a little care will always keep you on the right side. You have only to think for yourself whether the nature of the property is such as to entail the necessity for giving any notice, and if you have the least doubt you can readily solve it by reference to the authorities. In the instance which we have just been supposing, it would be an essential part of your duty to give notice of the appointment, and of the assignment of the appointed share, to the trustees who hold the fund and will ultimately have to divide it. If, again, it be a policy of insurance, notice of the assignment must be given to the Life Office. Or, to take an instance of a statutory class of notice, if land in a register county is conveyed on trust for sale, a memorial must be registered. In short, it must always be present to the practitioner's mind that, in addition to the actual making over of property to trustees, whether by the settlement or by a deed executed side by side with it, some notice or other formal step may be necessary to perfect the title, and that in all such cases he

Importance of giving notice in certain cases.

must be on the alert to see that everything is done completely and regularly. And let me add this: that to the best of my powers of observation, nine out of ten of the slips made in such matters as these owe their origin not nearly so much to ignorance as to carelessness—in the omission to *think out* all that has to be done. No man can be called a competent conveyancer until he has learnt the lesson that the practice of that art admits of no happy-go-lucky mode of execution, and that however important rapidity may be in these days, it is better to be a sure than a quick workman. With increased opportunities of gaining experience, the gap between those two widely different characteristics of labour will gradually disappear, and you will be able to work both quickly and surely; but I earnestly advise you in your student days, when you are, as it were, engaged in mapping out the country which lies before you, to concentrate your minds upon the effort to possess the latter rather than the former capacity.

I close this Lecture at the point of our having seen that the trust property is safely consigned to the legal ownership of the trustees, and we will, in my next Lecture, resume the thread of the subject from that as our starting point.

SIXTH LECTURE.



SETTLEMENTS <i>(continued)</i> .	{	ANTE-NUPTIAL SETTLEMENTS OF REAL ESTATE CONVERTED, AND OF LEASEHOLD AND OTHER PERSONAL ESTATE— <i>(continued)</i> :—
		OUTLINE OF SETTLEMENTS— <i>(con- tinued)</i> .
		POINTS ARISING SPECIALLY ON SETTLEMENTS OF— (a) LIFE POLICIES. (b) FURNITURE.
		 VOLUNTARY SETTLEMENTS.
		 THE OFFICE OF TRUSTEE.

SIXTH LECTURE.



At the conclusion of my fifth Lecture we had reached the point of vesting in the trustees of a marriage settlement, whether of personal estate or of real estate converted into personalty by means of a trust for sale, the property brought into settlement.

I therefore take up my subject in this Lecture from that as our starting point.

The step next in order to that of making over the property to the trustees will obviously be to declare what the trusts are upon which they are to hold it, and of these the first has reference to its investment. Trusts of settlement.

If the property settled consists of so much money paid to the trustees now, or to be paid to them on the happening of some future event, it must obviously be invested before it will produce income. If, again, it consists of some investment, such as stock or bonds, then it will probably be producing income in its existing state, but it may be desired that the present nature of the investment shall be changed, and it certainly will be desired to give the trustees a discretionary power to change it with or without the consent or request of beneficiaries, as the case may be. Hence the obligation of investment, whether it be immediate or discretionary in point of time, will be the primary duty cast upon the trustees, and the mode of expressing this obligation, as, no doubt, all of you are aware, is to specify in the settlement the classes of securities in one or more of which the trustees may invest the trust funds, and at Trust for investment.

the same time to give power to them to vary or trans-
pose the securities.

Now the question of the mode of investment is one in which the beneficiaries are naturally much interested, it being a very material consideration for their pockets whether the trust property is dealt with so as to produce income at the rate of three per cent. or some higher rate; and the investment of money is, moreover, a matter about which some people know, and many more people think they know, a great deal. It follows, therefore, that the choice or range of investments to be authorized may theoretically be said to be a question for the client rather than the solicitor. But, as a dry matter of fact, it is the exception, rather than the rule, for clients to express any individual views on this subject, or to relieve their solicitors from the responsibility of specifying the securities, beyond this, perhaps, that the large majority of people prefer the investment clause to be wide in its terms, and the small minority entertain the opposite view and aim at safety, not only as if it were the paramount, but as if it were the only object of the investment.

In former days, indeed, the latter view appears to have prevailed, and if you turn to a settlement or will made fifty years ago you will generally find the powers of investment limited to the public funds, or Government or real securities in England or Wales. These narrow limits owed their origin no doubt to the few avenues formerly available for the safe investment of money at a higher rate of interest. But, like many rooted customs, it outlived the cause of its existence, and it is only of comparatively recent date that the means of investing money afforded by railways and many other modern outlets for capital have been recognized by conveyancers in framing investment clauses.

It cannot be said that there is any settled practice on the point, but you will not, I think, err if, in the

absence of special instructions, you adopt, with one exception, Mr. Charles Davidson's view (*a*), which is, that the clause may be appropriately framed so as to embrace investments in the funds and government securities of the United Kingdom or India, or any colony or dependency of the United Kingdom or India, upon real or leasehold securities in England, Wales, or Ireland, and in the stocks or shares, or upon the debentures, mortgages, or securities of any corporation, company or public body, municipal, commercial or otherwise, in the United Kingdom or India, or any colony or dependency of the United Kingdom; thus in fact, as Mr. Davidson observes, extending the powers of the trustees in this respect to most descriptions of investment or security, within the protection of the law of England, or any British dependency, and calculated to circulate in the English market for investment.

You will not, I think, have much difficulty in guessing the exception which I just reserved in this list. The passage from which I have quoted it was published in 1873, but, had it been written to-day, I think we may confidently assume that real and leasehold securities in Ireland would not have been included in the list. At all events, I entertain myself the strongest possible opinion that those securities are not in the present day such as the heart of any man would desire who could invest his money in anything else.

I shall have a few words to say later on as to the actual investment of trust funds, but, for my present purpose, I pass from the investment clause now to the trusts which map out the successive interests of the beneficiaries, and terminate with the ultimate payment over of capital, by which, of course, the trusts of the settlement are brought to an end.

(*a*) Davidson's Precedents, 3rd edit. Vol. III. p. 16.

Usual trusts
for bene-
ficiaries.

I will first take the usual limitations of these trusts, and then refer to some of the causes which may operate as reasons for departing from them.

Trusts of
income.

First, the income of the fund brought into settlement by the husband would be given to him for life.

Then the income of the fund brought into settlement by the wife would be given to her during her life for her separate use, without power of anticipation.

Then the income of both funds would be given to the survivor for life.

Trusts of
capital.

Next, the capital would be made divisible between the children or remoter issue, in such shares, at such ages, and upon such conditions, as their parents may appoint by deed, or the survivor of the parents may appoint by deed or will; and, failing the exercise of this power to appoint, the trustees would hold the capital in trust for division among the children in equal shares.

At this point, and before the declaration of a final trust as to the property, to take effect in default of children, would come in important provisions having reference to the foregoing trusts for children or issue.

Hotchpot
clause.

Thus there would be a hotchpot clause precluding a child in favour of whom or whose issue any appointment may have been made from sharing in the unappointed part of the trust funds without bringing the appointed share into account, or, to speak familiarly, without giving credit for it.

Maintenance.

It would also formerly have been essential that a maintenance clause should be inserted, of which the effect would have been to provide for the destination of the income of the trust funds after the deaths of the parents during the minority of the children if that contingency occurred. The scheme of this clause was, broadly, to empower the trustees in the supposed event to apply all or part of the income of the expectant share of any minor for his or her maintenance and education, with liberty to pay it to the infant's

guardian without being answerable for its application, and to invest the residue, if any, of the income at compound interest, and add the accumulations to the capital of the share, but with power to resort to any accumulations of preceding years, and apply them for the purposes of maintenance and education.

I have spoken of this clause in the past tense for a reason which I will now explain. The 26th section of Lord Cranworth's Act (23 & 24 Vict. c. 145), contained provisions for enabling trustees to apply income for purposes of maintenance or education, under certain conditions. The section was undoubtedly intended to supersede the necessity for inserting express powers of maintenance, but it was too limited in its terms to meet with general approval from the conveyancers, and the statutory provision was not usually relied on as rendering needless the express clause.

Now, however, this section has been repealed and replaced by the 43rd section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), which enacts that, where any property is held by trustees in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently, on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not. Then follows a direction that the trustees are to accumulate all the residue of the income in the way of compound interest, by investing the same and the resulting income from time to time on authorized securities, and are to hold the accumulations for the benefit of the person who

ultimately becomes entitled to the property from which they arise, but with liberty to apply the accumulations, or any part of them, as if they were income of the current year. The section concludes with a proviso that it shall apply only if, and as far as, a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms and provisions of that instrument.

This new provision is, in several important respects, wider in its terms than the repealed section of Lord Cranworth's Act (*b*), and it would not, I think, be rash to anticipate that an express power of maintenance will drop out of settlements, unless in exceptional circumstances.

I would point out to you, as a corollary to what I have just been saying, that when it is desired in any case to curtail the large powers of maintenance conferred by the Act (as, for instance, by specifying a fixed maximum sum for maintenance), it will be necessary to express the contrary intention carefully in the instrument.

I shall have occasion hereafter, in one of my Lectures upon Wills, to recur to this subject of maintenance in its bearing upon legacies (*c*).

Advancement
clause.

The third and last of the group of provisions which we are now considering is what is termed the advancement clause, which empowers the trustees, with the consent of the parents or surviving parent, and after the death of the latter, at their own discretion, to advance some given proportion of the expectant share of an infant child or remoter issue of the capital of the trust funds for the infant's advancement in life. The proportion over which this power is given varies, but is usually not less than one-third, and rarely, if ever, more

(*b*) See Clerke and Brett's Conveyancing Acts, 2nd edit. p. 157.

(*c*) See *post*, Lecture VIII.

than one-half of the share. I need hardly say that it is a most important and valuable power.

Reverting next again to the main thread of the trusts, there will now come the final trust, to take effect in default of issue of the marriage, and this will, as to the fund settled by the husband, take the simple form of a trust for him absolutely. And in the case of the wife's fund, there will be a corresponding absolute trust in her favour, in the event of her surviving her husband, but the trust, to take effect as to her fund if she should die in her husband's lifetime, needs a little more explanation.

Final trusts
in default of
issue.

Before the Married Women's Property Act, 1882, came into force, the usual trusts in this event were as follows:—

First, that the fund should be held upon such trusts as the wife should, notwithstanding coverture, appoint by will; and, secondly, in default of appointment, that the fund should be held in trust for the wife's next of kin, exclusive of her husband.

You will readily see that the necessity for these trusts has been largely affected by the statute, and that they were intended mainly to meet the difference, in the legal position, of a wife as to her own property where she died in her husband's lifetime, and where she survived him; but I think that there is still a good deal to be said in favour of retaining them, and I will try to explain my reasons for that conclusion. Suppose that the trust is in favour of the wife absolutely, irrespective of whether she survives her husband or dies in his lifetime, and apply that to the latter case which we are considering. The wife would now, under the Act, be entitled in the supposed case to deal with this absolute interest during her life, subject, of course, to the life interests of herself and her husband, as well as by her will. Is it desirable to place it in the wife's power to dispose, otherwise than by will, of that which cannot come into possession until her death, which, if dealt with *inter vivos*, can only be dealt with as a reversionary

*she might
dispose of
it by will
or by deed*

interest? That is a question to which some people would give an affirmative and some a negative answer, and I am very far from asking you to accept my own conclusion as infallible, but it is my personal view that it is better, on the whole, in the interests of both parties, that the wife's powers of disposition should be limited to a power to appoint by her will, as under the trust in use before the statute, because it appears to me that the few cases in which the larger power might be used wisely, and without undue pressure or influence from the husband, or imprudence on the part of the wife, would be counterbalanced by a much larger number of cases in which the existence of the power might furnish a temptation to exercise it improvidently, and to sacrifice the true interests of the wife and her family. Then, as to the second trust—that, in default of appointment, the property is to go to the wife's next of kin, exclusive of the husband—this is clearly traceable to the general principle that the settled funds should, in default of issue, revert ultimately to the source from which they proceeded. If, under the Married Women's Property Act, 1882, a husband is still entitled to his wife's personal property in the event of her dying intestate, then the trust is still necessary if the old result is to be attained, because if the wife is made absolute owner the husband will only have to administer to her effects to entitle himself to the whole of the settled fund. But then, as I have pointed out, it is said to be doubtful whether a husband married to-day is still entitled to his wife's personal estate as her next of kin, and until that doubt is judicially solved it is impossible to declare with absolute certainty whether the form of trust hitherto in use, by which he is excluded in terms, is or is not necessary to produce the result expressed in its language.

Upon the whole, therefore, you will see that while one at least, and possibly both, of these ultimate trusts

of the wife's settled fund may be said to be affected by modern legislation, there are weighty reasons why the draftsman should still retain them.

To the provisions which I have enumerated as those most ordinarily to be found in a settlement may next be added, not a power to appoint new trustees, because that is now by universal practice omitted, in reliance upon the statutory powers given by the 31st section of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), but a clause which declares by whom the statutory power is to be exercised. In the absence of any provision on the point, the statute confers the right of exercising this power upon the surviving or continuing trustees, or the personal representatives of the last surviving trustee, as the case may be, but it is very commonly wished that the power, or at all events a voice in exercising it, shall rest with one or more of the beneficiaries, and, in this event, a clause must be inserted giving effect to the desire.

Appointment
of new
trustees.

I have dwelt so far entirely upon the usual everyday provisions of a marriage settlement of personal estate, provisions which you would expect to find as a matter of course, and none of which should be left out without some sufficient and special reason; but there is one important clause which, before the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), became law, was so commonly inserted that, but for that Act, I should have had no hesitation in placing it among the group of clauses which I have brought before you, and, even now, it is of sufficient importance to merit a special place mid-way, as it were, between usual and more or less unusual provisions. I refer to a provision for the settlement of the after-acquired property of the wife.

Provision for
settlement of
wife's after-
acquired
property.

We have already seen what was and is the position of the husband with regard to his wife's personal estate irrespective of any settlement; that, having once had paramount rights, he is now reduced to complete

nonentity. Under the former law it was usually considered wise and just, in the wife's interests, that any property which might come to her during the coverture should not find its way into her husband's pockets, but should be made secure by being, as it were, incorporated by anticipation into the marriage settlement, in the shape of its being agreed that it should be paid to the trustees and held upon the trusts which I have described as attaching to the wife's settled funds, or, less commonly, that it should become the wife's absolute separate estate.

We may dispose of the latter of these two plans at once. As the law now stands, any property accruing to the wife is her separate estate, and if the protection is to stop at that point, no provision in any settlement is needed to secure it.

Considerations bearing upon it.

But upon the other method, as upon the trusts of the wife's property generally, arises the point which we have already considered. Does the statute go far enough to afford reasonable protection to the wife, as compared with that which can be secured by the machinery of a continuing trust? I have already expressed my opinion in the negative upon this as a general question, and need only say that my view applies just as strongly to the case of after-acquired as to existing property of the wife; indeed, it is obvious that in principle there is practically no distinction between the two cases. If the wife has absolute control over her means, and her husband wishes her to exercise it improvidently, she must either yield to pressure which may end in disastrous results, or she must decline to do so, which, according to the ordinary experience of human nature, is not calculated to promote domestic bliss. If, on the other hand, her property is in the hands of Mr. A. and Mr. B. as trustees, she is in a position in which she has no power to gratify her husband's desire to make ducks and drakes of her property, and cannot be subjected

to any risk of disagreeable consequences for refusing to do so.

Of course there are exceptions to this as to every rule. There are cases here and there in which the tying up of a fund in trust proves, in the events which happen, to be detrimental to the interests of the husband and wife; but I am persuaded that such cases are the exception, and cannot for a moment be weighed in the scales against the benefit conferred by these provisions for the protection of the wife's property.

I have said thus much as to what may be called the policy of this provision, both because of the bearing of the Married Women's Property Act, 1882, upon it, and because the subject is one upon which a solicitor is often called upon to express his views and as to which he possesses opportunities, such as fall to the lot of few clients, of forming a sound opinion. The ordinary lay client may be supposed to be capable of understanding the purport of this term of the settlement when it has been explained to him, but he will certainly need to have it brought to his attention, and you cannot possibly discharge yourselves efficiently of the duty of placing it before him unless you have a clear appreciation of the state of the law which the provision would modify, and of the practical considerations involved in it.

As to the form of the provision, the use of loose and careless language has given rise to a great deal of litigation. The questions litigated have, as you would guess, been such matters as these—within what limit of time it has been confined, to what description of property it has extended (especially in connection with reversionary interests), and whether it has been so framed as to bind the husband or wife, or both. Treating the subject, as I do, from the point of view of your having occasion to prepare a settlement, and looking to the fact that many of the cases turn upon points which, since the Married Women's Pro-

Form of the provision.

perty Act, do not possess the same practical importance as formerly, it would hardly serve any useful purpose to examine in detail the results which have followed from the use of inappropriate language, and I would rather direct your attention to the consideration of what is the proper frame of the provision.

With regard to what may be called the operative words, the most approved plan is to frame the clause as a declaration and agreement, which of course carries with it the legal result of a covenant both of the husband and wife (*d*).

Again, as to the period over which the covenant is to extend and the property which it is to embrace, the approved method is to make it include all real or personal property, exclusive of property acquired at one time and not exceeding in value a certain minimum amount, and excluding also such subjects of property as furniture or jewellery, which the wife is, or she or her husband in her right may during the coverture become seised, or possessed of, or entitled to, or acquire a power of disposition over, for any estate or interest in possession, reversion, remainder or expectancy (*e*). This scheme, as you will observe, is very comprehensive, and, with the exceptions which I have mentioned, sweeps in every interest to which the wife is entitled at the time of the marriage, or may afterwards acquire during the coverture. It is to be borne in mind that there may be instances here and there—I refer more especially to the case of your being concerned for the husband—in which there may be a sufficient reason for not depriving the husband and wife of the control of the capital of any fortune that may come to the latter during the marriage. But the practical course to adopt where any general rule applies is, I think, to walk by the light of

(*d*) Davidson's Precedents, 3rd edit. Vol. III. p. 196; Prideaux's Precedents, 12th edit. Vol. II. p. 235.

(*e*) Davidson's Precedents, 3rd edit. Vol. III. p. 200.

that rule, and when exceptions arise to deal with them as exceptions, and to be satisfied of the sufficiency of the reason for so treating them.

So far we have been travelling on ordinary lines. I now propose to turn aside a little from the beaten track and to ask you to consider the principal variations from the most ordinary provisions of a settlement of personal estate. As compared with the clauses of which I have been speaking, they may be considered as exceptional; but the cases to which they may with practical advantage be applied are quite sufficiently numerous to render it a matter of necessity that you should be familiar with them. They fall conveniently into the two divisions of variations of the ordinary trusts of a settlement irrespective of the nature of the property settled, and of special points attaching to particular classes of property put into settlement.

Variations
from ordinary
provisions.

We have seen that the usual plan is to give the husband the first life interest in his property and the wife the first life interest in hers. This rule of course may be departed from at the pleasure of the parties, and, upon the question of general principle, it is said that the weighty opinion of Lord St. Leonards was adverse to giving the wife the first life interest in her own fortune. But the general voice of the profession has long since pronounced itself in favour of the rule as I have stated it, and, as we need not concern ourselves either with exceptional views or with the caprices of individuals, I limit myself strictly to the consideration of those cases in which a proposed variation has something like a general principle in its favour. I know of no such principle applied to the rule of giving to the wife the first life interest in her own personal property. In the case of the wife owning considerable landed property, the social position which the ostensible owner for the time being occupies is sometimes considered a sufficient reason for giving her husband the first life

Variations
irrespective of
nature of pro-
perty settled.

(1) As to
wife's pro-
perty.

interest and confining her interest during his life to a jointure; but this special reason has no application to personality, and I am unable to suggest another possessing any general application.

(2) As to
husband's
own property.

With regard to the husband's property, however, it may be desirable to shift the first life interest to the wife for a reason which you will quickly appreciate. The object of a marriage settlement, as I have said, is to make a provision for the husband, wife, and children. Now, generally speaking, the husband, wife, and children will all derive their due share of benefit from the income of the settled fund while it is paid to the husband. But suppose that the husband is in trade, and he fails in business and becomes insolvent, his life interest will be a target for his creditors to shoot at, and may, by process of law, be made available for payment of his debts. For remember that, although marriage is a good consideration, and a marriage settlement holds good against creditors on that account, there is no equity on the part of wife or children to protect any interest given by the terms of the deed to the husband from being made available to meet his obligations. Accordingly, wherever there is any cause to fear that the income of the husband's property, if given to him, may be diverted from the purposes of home expenditure, which may be supposed to have been in the contemplation of the parties at the time of the marriage, to the prejudice of the wife and children, and for that matter to the husband's own prejudice—it is deemed prudent to give the first income of the whole of the settled property to the wife, and to run the lesser risk of her making an unwise or improper use of the power placed in her hands rather than the greater risk of the income being swept away by the husband's creditors. Perhaps I need hardly say that the husband's creditors do not quite appreciate this view of the situation, and are apt, when he fails in business, and they find that his home,

his furniture, and the income on which he is living are carefully protected from their claims, to use unparliamentary language about marriage settlements.

As to property brought into settlement by himself—by which I mean actually belonging at the time of the marriage to him personally and not settled by his father or anyone else on his behalf—the method which I have just described is the only one by which the settled income of the husband can be protected from his own debts and engagements, but in so far as his interest in any property settled by or on the wife's part or on the husband's side, but not by him, is concerned, there are yet two other plans, the validity of both of which has become firmly settled, though, as to the latter, after considerable doubt.

(3) As to property settled on husband's side but not by him.

I may explain these devices, by applying them to the case of the husband's usual life interest in his wife's settled fund, in the event of his surviving her. The first method would be, to insert a provision in the trusts of the settlement, declaring that this interest shall be determined in favour of the next limitation, not only at the husband's death, but also in the event of his bankruptcy, insolvency, or, as Mr. Davidson comprehensively expresses it (*f*), any act or event inconsistent with his personal enjoyment. This, as you will see, defeats the husband's creditors, but it also puts an end to his own interest, and lets in the next limitation.

The second device is much more favourable to the husband, and its abstract morality is, to my mind, open to very considerable question, but the law has after much hesitation upheld it. It is to provide that, in the event of the husband's bankruptcy and so forth, his interest shall determine, but that the trustees may, in the exercise of a discretionary power given to them,

(*f*) Davidson's Precedents, 3rd edit. Vol. III. p. 125.

apply the income with power of exclusive selection in favour of the husband and issue, or whatever objects of the trust may be specified. It is said by Mr. Davidson (*g*), that under such a trust as this, the trustees may, in fact, actually pay the income to the husband himself, for the purposes of personal or family expenditure, thereby virtually giving him a protected life interest, differing very little from the inalienable interest conferred on married women, by means of a direct restraint upon anticipation.

Provision for contingency of premature death of either parent.

The next deviation from ordinary trusts, to which I wish to draw your attention, has reference to the contingency of the premature death of either parent. The usual trusts, as I have pointed out, would, on the happening of a death, give the income to the survivor, and then the capital among the children of the marriage. But, suppose, as is frequently the case, that everything the wife possesses is swept into the settlement, and that the husband dies when she is still young, leaving her, perhaps, with one child. It may reasonably be supposed, that she will very likely marry again, and have a second family. But, under the ordinary trusts, her one child by the first marriage, will get the whole of the trust property, and her children by her second marriage, will not get a shilling of their mother's fortune—a result of which the inequality and injustice are too obvious to need comment.

If we suppose the death of the wife, instead of that of the husband, we find the same result; but there is this practical difference between the two cases, that the husband will, presumably, be more likely, and better able by his exertions and earning powers, to make a provision for the children of his second marriage than the wife. Still, as I say, the result is the same, so far

(*g*) Davidson's Precedents, 3rd edit. Vol. III. p. 191.

as the settlement fund is concerned, and the likelihood of its working unjustly, according as the husband or wife survives, is only a question of degree.

The case which I am supposing is manifestly not very unlikely to arise, dependent as it is on no more remote contingency than the death of either the husband or wife, followed by the marriage of the survivor, and the birth of issue of that marriage.

As to the mode of dealing with this matter, the point to bear in mind at starting is that the provision should be reasonable, and it is obvious, that the datum point from which to calculate what is reasonable, would be furnished by the amount of the settled property, and the number of children of the first marriage, who may become objects of the settlement. The most approved method, I think, is to give to the wife, if it be the wife's fund in question, a power exerciseable in the event of her surviving her husband, to appoint by deed or will, to any future husband, the income of any part of the trust funds, not exceeding the proportion presently mentioned, and to appoint, in like manner, any part of the capital not exceeding the same proportion, for the benefit of the children, or remoter issue of any future marriage, and in the instrument of appointment, to confer on herself and her husband and the survivor a power of appointment among their issue; and also to give to the trustees of the settlement powers of advancement for the benefit of such issue; thus, as you see, engrafting on the settlement a sort of contingent power of making a fresh settlement applicable to a future husband, and issue by him. Then would follow the provision defining the extent of the proportion. This, I need hardly say, admits of no settled rule, and is essentially a matter for discussion, but the right principle is, I think, a sort of sliding scale by which the provision for the children of a subsequent marriage is made to bear a maximum relative proportion to the shares of the

children of the first marriage. The form of clause is necessarily long and complicated in language, but you will find a good illustration of it in *Prideaux's Precedents*, 12th edit. Vol. II. pp. 268—270.

In sketching the outline of this group of provisions I have taken the case of the power being given to the wife. The same provisions apply convertibly to the case of its being given to the husband.

You will, I think, agree with me that this variation of the ordinary clauses of a marriage settlement may, in some cases, be very right and just, and that the matter is one to be carefully borne in mind by a solicitor who is called upon to prepare or peruse such a settlement. As to the cases in which it should be suggested to your client that the settlement should contain provisions applicable to a second marriage, there is not very much to be said. As I have already indicated, the finger of common sense points rather in the direction of the wife's than of the husband's settled fund, and especially where the whole of her probable fortune is brought into settlement. You will also readily see that elaborate provisions of this kind are scarcely appropriate where the settled property is of small amount, or, again, where the settled fund does not represent all, or nearly all, of the settlor's fortune, and other means therefore exist out of which the children of a future marriage may be provided for.

In concluding what I have to say upon this part of my subject I would impress upon you that no special provisions of this, or any other kind, should ever be inserted in the draft of a settlement without the full knowledge and approval of your client, however much you may be persuaded of their justice and propriety, even where he places his interests in your hands unreservedly. The right course, whenever you propose to depart from a beaten track, is to submit the point to your client, to give him your reasons for the view which

you entertain, and then to leave the decision to him. When you have suggested all the points which call for his determination, and have placed them before him, with the arguments which appear to you to be capable of enforcement *pro* and *con*, you will have discharged your duty, no matter whether his decision be right or wrong. But you will not discharge your duty, in the true sense of the expression, if you journey along your road looking neither to right nor left, paying no regard to special circumstances, and using the same precedent as a model for a dozen different settlements, as if it had some magic power of fitting all alike without distinction. The young solicitor who seeks to be a master of his professional work, and not a drudge, must give his whole mind to each individual matter, and realize that ingenuity and suggestiveness are never thrown away.

The next and last departure from the ordinary clauses of a settlement of personal estate to which I desire to draw your attention is a group of provisions sometimes inserted where it is desired to confer on the trustees a power, exerciseable at the request of the life beneficiaries or one of them, to invest all or part of the trust funds in the purchase of real estate. The mode in which this may be effected consistently with preserving the personal estate character of the settlement is to declare that the real estate, when purchased, shall be held in trust for sale, and then will follow provisions as to the sale, the letting of the property, and application of the rents until sale, and so forth, closely analogous to those of which I have already explained the purport in connection with the bringing of real estate into settlement as personalty.

Provision for investment of trust funds in real estate.

Now this power is one for which a client here and there may possess a strong liking, and in such a case you will, of course, be acting rightly in fulfilling his wishes; but I do not, for my own part, regard it with favour, and I do not think that in ordinary circumstances

a solicitor is called upon to suggest it of his own accord ; on the contrary, I think that he will better discharge his duty by resisting its insertion and pointing out the arguments against it where a reasonable opportunity of doing so is afforded to him.

To see what those arguments are we must come back once more to first principles, and remember that the object of a marriage settlement of personal estate is to provide a sure means of subsistence for husband, wife, and children, and not the acquisition of landed property. The investment of trust funds in real estate carries with it of necessity a great increase in the trouble and responsibility cast upon the trustees, and more or less probable contingencies of future difficulties in the administration of the trust. The property purchased may deteriorate in value or marketable qualities and situation. It may be left on the trustees' hands for a more or less extended period, and perhaps during the minority of infant beneficiaries, unlet and requiring an expenditure in repairs and upkeep which the trustees have no means of meeting at all or without crippling funds sorely needed for other purposes. The question whether this or that outlay would properly fall on income or capital may be one of considerable nicety. And last, but not, I think, practically least, the trustees may be subjected to the importunities of beneficiaries with limited interests, by whom the machinery and restrictions of a trust are often regarded with impatience even where created by their own act, to purchase some particular property where the judgment of the trustees is opposed to the project. Then follows an almost inevitable soreness and the establishment of relations, the reverse of pleasant, between the trustees and the *cestuis que trust* or between the trustees themselves, all the more to be deplored when it is remembered that they presumably start those relations on terms of mutual intimacy and confidence.

For all which reasons I venture to think that this power to purchase freehold or leasehold property is, in the vast majority of cases, not a desirable adjunct to a settlement of personal estate.

Let us turn now to the consideration of a few particular subject-matters of settlement which leave their impress on the provisions of the deed. Particular classes of settlement.

Among these come first and foremost a very common subject of settlement—policies of life insurance. Policies of life insurance.

Now, you are all well aware that a policy of insurance, unless it has been in existence for a great many years, possesses little value during the life on which it is effected, for the simple reason that in order to keep it in force periodical premiums have to be paid, and that it may be forfeited by a breach of its provisions in other respects. It follows that, as a subject of settlement, a new policy can only be regarded as of value to the extent to which it can be reasonably anticipated that these premiums will be regularly paid and the other conditions of the policy performed. To secure this there will be as of course a covenant by the person who brings a policy into settlement to pay the premiums and to do no act to invalidate it. But this personal covenant may, like any other personal covenant, break down, and it is very desirable to bolster it up in some way, as far as the payment of premiums is concerned, with collateral powers which may enable the trustees to meet the emergency. One obvious mode of doing this, if other funds are brought into settlement, will be to empower the trustees to apply income arising from them in payment of premiums. Failing that resource, there is nothing for it but to authorize the trustees in general terms to pay the premiums out of any monies available for the purpose, and, if they think fit, to surrender the policy to the life office so as to secure for the settlement purposes, in the last resort, some salvage at least out of it. Payment of premiums.

You will observe that in seeing to the keeping up of a policy the trustees of a settlement undertake a good deal of responsibility, and it is usual and proper to insert special provisions absolving them from any obligation to enforce the covenant to pay the premiums, and even from any liability for the consequences of the policy becoming void from any cause. How far this last clause would be held to absolve trustees in the event of their simply abdicating their functions and allowing the policy to become void without even informing themselves on the point, or lifting a finger to prevent it, is a question to which I should await a judicial answer with some trepidation if the remark applied to myself, because the Court has a way of very much narrowing down the effect of sweeping words of indemnity.

Bonuses on
policy.

The profits declared periodically in the shape of bonuses upon a policy put into settlement are, in the absence of special agreement, treated in law as part of the capital of the trust fund; the Court, as Mr. Joshua Williams, in his work on the Law of Personal Property (*h*), observes, usually considering every bonus, whether of additional joint stock or shares or simply of money, as part of the capital, unless it appears to be nothing more than an increased dividend arising from the increased profits of the year. The same writer adds that, in the absence of any special provision to the contrary, every bonus ought to be invested upon the trusts of the settlement, and the income only paid to the tenant for life.

I would pause here to ask you to note in passing that the words which I have just read have a wider application than to policies alone, although they certainly include them, and may on that account also be usefully remembered.

(*h*) 11th edit. p. 311.

It is not, however, at all clear to my mind, upon principle, that bonuses declared on a policy ought, in the absence of its being so declared, to be treated as capital. They are mere accumulations of profits periodically divided, and in the American offices they are, I think, actually divided every year. But doubt upon such a point as this can never arise upon a properly drawn settlement, because the mode of dealing with bonuses will be in terms provided for. One very reasonable plan is to give the trustees a discretion, or the person who has to pay the premiums an option, to have the bonuses applied in reduction of the premiums. Another method is to give the person who settles the policy an absolute option as to the mode of dealing with bonuses. And a third, and I think not desirable because not sufficiently elastic, way is to declare without qualification that they are to be added to the sum assured, or are to be paid to some object of the settlement.

I need hardly say that the trusts of a life policy must necessarily differ from those of settled funds generally in the matter of dropping out the life of the person on whose life the insurance is effected. Thus, where the husband effects the insurance the only life interest will usually be that given to the wife in the event of her surviving him, and then will come the trusts for the issue. But this observation has, of course, no application to what are called "Endowment Policies"—that is, policies payable at a certain age, or after payment of a certain number of premiums. Here a life interest should obviously be given to the husband, to take effect if he lives to complete the period or the payments.

Trusts of
policy.

I must not leave the subject of policies of insurance in connection with settlements without pointing out to you that they are specially favoured by the legislature, a circumstance which may be supposed to rejoice the heart of the Thrift Society. If you turn to the 11th section of the Married Women's Property Act, 1882

Statutory
settlements of
policies.

(45 & 46 Vict. c. 75), which replaces a similar section in the Act of 1870 (33 & 34 Vict. c. 93, s. 10), you will find provisions for making a sort of settlement of a policy, on the part of a husband, by the simple expedient of expressing in the policy itself that it is for the benefit of his wife and children, or any of them ; and the same power is given to a wife as to a policy expressed to be effected for the benefit of her husband and children, or any of them. The machinery of a trust is impressed in a rough and ready fashion on such a policy, and it is declared concerning it that it shall not be part of the estate of the person effecting it so long as any object of the trust is unfulfilled, or be subject to his or her debts. The life offices give every facility for carrying out these provisions, and some of them, I believe, will accept the actual trusteeship of the policies issued by them under the Act.

The statute may well be made use of where the means are small, a policy the only subject of settlement, and the expense of an ordinary settlement deemed to be more than commensurate with the advantages gained by its more elaborate provisions for contingencies ; and I commend the section to your careful notice, and advise you to impress it upon your minds, by getting hold of the forms made use of by some life office for policies issued under the Act.

Settlement of
furniture.

To go to another subject, it is not very unusual to include furniture in a marriage settlement.

Generally speaking, the advantages of protection gained by settling furniture are, I think, a good deal more than weighed down by the objections which the shifting and wearing out nature of the property, and the difficulty of exercising any real guardianship over it necessarily entail ; but where the husband is in trade the expedient may perhaps be prudently resorted to as a protection from his debts. One method—perhaps the best—of shaping the settlement, where the furniture

is settled by the wife, is to impress an immediate trust for sale upon it, and declare the trusts of the purchase-money, and then add a provision that the sale should not take place during the life of the wife without her consent, and that she may use the furniture for her separate use, and so on. The settlement would also contain clauses for enabling any one article to be substituted for another, for insuring the furniture from fire, and for relieving the trustees from responsibility for its safe custody. These are the usual and proper precautions, but even when they have been taken there must still always remain from the inherent nature of the settled property, many objections which no ingenuity of draftmanship can surmount.

You will remember that I divided settlements at the outset into the two broad divisions of settlements in consideration of marriage or of some other valuable consideration, and voluntary settlements—that is to say, settlements not made for any of the valuable considerations of marriage, money, or money's worth. This second class of settlement may now claim our attention for a short space.

The one essential distinction of all others between these settlements and those which we have been considering is their liability to be defeated by creditors, and by the subsequent acts of the settlor himself. This liability, so far as it relates to creditors, is dependent partly on very old and partly on modern statute law. The Statute 13 Eliz. c. 5, to begin with, renders void all conveyances whether of real or personal estate made with intent to defeat, hinder, or delay creditors, as against such creditors; but with a saving in favour of purchasers for value without notice. This Act extends even to settlements made for valuable consideration; but you will not fail to observe that it applies only where there is at the time, and in connection with the making of the instrument, an *intention* to defeat, hinder, or

VOLUNTARY
SETTLEMENTS.

How they
principally
differ from
other settle-
ments.

13 Eliz. c. 5.

delay creditors. It would have no bearing, therefore, upon a voluntary settlement made to-day by a man who is perfectly solvent and who becomes gloriously the reverse three months hence.

27 Eliz. c. 4. Upon the heels of this statute followed another of the same reign also still in force, the Act 27 Eliz. c. 4. This provides in substance that all voluntary conveyances of real estate—to which class of property the statute is limited—and also all conveyances of real estate, with any clause of revocation at the grantor's pleasure, are void as against subsequent purchasers for money or other valuable consideration. This statute rides rough-shod over the tender consideration which the Court of Chancery has always displayed to the doctrine of notice, the effect of it, as described by Mr. Joshua Williams (*i*), being that any person who has made a voluntary settlement of landed property even on his own children may afterwards sell the same property to any purchaser; and the purchaser, even though he have full notice of the settlement, will hold the lands without danger of interruption from the persons on whom they had been previously settled.

So far we have it then that a voluntary settlement, whether of real or personal estate, made for the purpose of defrauding creditors, would be declared void, and that a voluntary settlement of real estate, for whatever purpose made, may afterwards be defeated by the settlor at his pleasure. But the bankruptcy laws have gone an important step further in the direction of protecting creditors. It was found that voluntary settlements became a favourite contrivance among reckless and dishonest traders, and were constantly interposed between them and their creditors. A speculative trader who netted a large haul over some virtually gambling transaction was often immediately seized with a virtuous

(i) Williams' Real Property, 13th edit. p. 80.

desire to settle the proceeds upon his wife and children. He could then go into another similar venture with a light heart, because if it eventuated in his total insolvency he was in the satisfactory position of being able to offer his creditors a shilling in the pound and then retire to the bosom of his family to live on the income of the settled money until another speculation tempted him from that seclusion. To meet this state of things—though only, I must add, in a partial degree—the bankruptcy laws came to the rescue of creditors for the first time by a section in the now repealed Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 91). Bankruptcy Act, 1869. This section was limited in its application to traders, and it declared as to them that any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on the wife or children of the settlor of property which had accrued to him after marriage in right of his wife, should, if he became bankrupt within two years after the date of the settlement, be void as against his trustee, and should also be void against his trustee if he became bankrupt at any subsequent time within ten years after the date of the settlement, unless the parties claiming under the settlement could prove—thereby, as you see, throwing on them the onus which, under the Act of 13 Elizabeth, would have rested on those who sought to upset the deed—that the settlor was, when he made it, able to pay all his debts without the aid of the property comprised in the settlement. The section concluded with a provision which I need not state at length, but of which the object was to bring within the net of the trustee any property which a trader might have covenanted or contracted, in consideration of marriage, to settle at a future time on his wife and children, but in which pro-

perty he had no estate or interest at the time of his making such an engagement.

Bankruptcy
Act, 1883.

This section in the Bankruptcy Act, 1869, has, with the rest of that Act, now been repealed, but is virtually repeated in the 47th section of the new Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), with this one important exception—that in the new Act the distinction formerly existing for some purposes of bankruptcy law between traders and non-traders has been swept away altogether, and accordingly the operation of the new section extends to all bankrupts alike. This change in the law came into force on the 1st January, 1884.

Necessity for
perfecting the
assurance.

I have explained somewhat at length how the law stands on this subject, because it is manifest that you cannot effectively advise a client as to the expediency of making a voluntary settlement unless you can yourself apply the general law to the special circumstances, and see how far they fit in; and, from the same point of view, I will just trespass on the confines of an equity, rather than of a conveyancing, lecturer's province to impress upon you that, in order to bind the settlor, every voluntary settlement must be attended by the doing of every act, whether it be the transfer of shares or of a mortgage debt, or anything else the subject of settlement, necessary for perfecting the assurance—a doctrine the application of which to cases where the subject-matter of transfer has consisted of mere equitable interests has given the Court much difficulty in the matter of determining what does, and what does not, constitute a perfect assurance. Several cases well illustrating this difficulty are cited in *Prideaux's Precedents*, 12th edit. vol. 2, pp. 221 and 222.

From what I have already said you will, I think, have no difficulty in arriving at the conclusion that a voluntary settlement has not very much to recommend it. But there is yet another undesirable feature attaching frequently to these settlements which points still

further in the direction of their comparative uselessness in many cases. They very often reserve to the settlor a power to revoke the deed at pleasure, so that he may, in fact, make it to-day and put it behind the fire to-morrow. At one time, indeed, the authorities all but went the length of saying that the absence of a power of revocation of itself made a voluntary settlement voidable by the settlor, but modern decisions have disapproved of this view, and, in a case of *Phillips v. Mullings* (L. R., 7 Ch. App. 244), in which it was unsuccessfully attempted to set aside a voluntary settlement upon the ground, among others, that it contained no power to revoke, Lord Hatherley laid down these propositions, which may, I think, be very usefully taken to heart by you and me:—

Power of
revocation.

*Phillips v.
Mullings.*

“It is clear that a solicitor who advises a client, for his own protection, to take a particular step of this nature does assume a very responsible duty, and where a person is induced to execute such a deed it must, in order to support the deed, be shown that the nature of the deed was thoroughly understood by the person executing it Whether there should be a power of revocation or not must depend upon the circumstances, and it cannot be laid down as a general rule that such a deed would be voidable unless it contained a power of revocation.”

Speaking a little later on of the circumstances of the particular case, Lord Hatherley said:—

“As to a power of revocation, it seems to me that if such a power had been inserted the young man’s money would merely have been wasted, and that no one but the solicitor would have derived any benefit from the deed, for of what advantage would it be to place the money in this way out of the young man’s control, and then give him power to destroy the limitations whenever he pleased? All that the law requires in a deed of this description is that it should

“ be effective, and should not contain any extraordinary clauses unless those clauses are shown plainly and distinctly to have been brought to the notice of the settlor, and to have been understood by him.”

*Henry v.
Armstrong.*

A somewhat similar attempt to upset his own act was made by a settlor in the more recent case of *Henry v. Armstrong* (L. R., 18 Ch. Div. 668), but he fared no better than the plaintiff in the case to which I have referred, and Mr. Justice Kay did not even call on the defendants. The grounds relied on were, first, that the plaintiff did not understand the purport of the deed, and secondly, that it was irrevocable. The first point, which was of course a question of fact, the judge decided against the plaintiff on the evidence, and on the other matter he said this :—

“ I was told that at the time when he executed the deed he was going on the Stock Exchange, and his object in executing the deed—which, it is said, was pressed upon him by his father-in-law—was to protect his wife and children. It is very common that a man should execute such a deed when he goes into business, and the ordinary way is that the deed should be drawn without any power of revocation, because, if there is a power of revocation and he falls into difficulties or becomes bankrupt, the assignment of his property would be practically useless. . . . I disregard the circumstance that in this settlement there is not any power of revocation, for any such power would be inconsistent with the objects of the settlement.”

It is clear from these cases that a power of revocation is by no means a *sine quâ non* in the case of a voluntary settlement ; but it is also, I think, obvious that a client who irrevocably conveys his property away should know that he is doing so, and his solicitor's duty is to see that the settlor clearly comprehends the consequences of his act and exercises a deliberate choice in the matter, and it is not perhaps going too far to say that the ques-

tion whether the settlement shall or shall not contain the clause is a matter for the client and not the solicitor to decide, although the latter may, of course, with perfect propriety, express his views upon it.

If the power of revocation is inserted, the value of the instrument, as Lord Hatherley pointed out, is necessarily not very great, and, upon the whole, I think you may take it as a sound general, but not by any means inflexible, rule that voluntary settlements are not desirable.

It is not practicable to reduce to any order or scheme the cases in which the rule may wisely be departed from. Let me instance to you, however, such a case as this:—A widowed mother has an extravagant son, whose importunate calls on her purse-strings she has not the moral courage to resist, though she is conscious that she is yielding to a weakness that may spell ruin both to herself and her son, and in this state of things she consults you. I suggest to you that in such a case the expedient of a settlement, with its attendant machinery of a trust and trustees, and the consequent preservation of the due relations of income and capital, may be well and wisely availed of, even to the exclusion of a power of revocation.

When
voluntary
settlements
desirable.

To take another class of instance altogether:—It happens at times that complications have arisen in the adjustment of family settled funds, or that irregularities have been committed in their administration which it is desired to condone, or that trust funds have been lost with or without some negligence or omission. If the parties concerned are all *sui juris* and legally in a position to put an end to or vary the existing trust, and they genuinely desire to make mutual concessions and set matters straight, the object in view may often be attained by a deed of family arrangement amounting, in fact, to a re-settlement of the funds in such wise as to

put the trust again on a right footing, or as nearly so as the events which have happened will permit.

A case came under my own notice, not long since, in which this course was adopted with the best results. The widow of a testator was his sole executrix and trustee, and was also entitled to a life interest in his property. She had so mismanaged the trust estate, in the best of faith but on the most extraordinarily wrong system, that she had committed, figuratively speaking, enough breaches of trust to make Lord Eldon turn in his grave. She had (among other things) spent more than the income, retained property which she was bound to sell, bought property which she had no right to invest in, and lent money on hopelessly unauthorized securities. In this state of things her children grew up, and when the facts were known, and the legal results pointed out, they all united in executing a deed in which the trusts of the testator's will were cancelled, fresh trusts closely resembling them declared, the mother released from all obligations, and policies on her life brought into settlement to make up for the loss sustained by the testator's estate through her irregularities.

From the special nature of voluntary settlements and the varying circumstances in which they are executed, it follows of necessity that their actual provisions do not admit of classification any more than the circumstances themselves. A voluntary settlement by a husband on wife and children will naturally bear a close resemblance in form, except as to recitals, to an ordinary marriage settlement, while a deed executed under circumstances such as I have just described will involve all sorts of special recitals, and present as close features of similarity to a release as to a settlement. They embrace every rank in the degrees of draftsmanship, from the most simple and easy to the most complicated and difficult, and I can only advise

Their
contents.

you to exercise carefully your discretion in each case, according to its circumstances, in determining whether the extent of the property at stake, or the difficulties of draftsmanship and of the questions of law involved, do or do not render it fitting that you should avail yourselves of the assistance of counsel.

I have reserved as the last topic of this Lecture some observations upon a subject which embraces equally settlements of all kinds, voluntary or otherwise, and which, in one shape or another, will constantly come before you in practice—I mean the office of trustee.

Observations
on the office
of trustee.

When a man is asked by an intending testator whether he will consent to act as trustee of his will, he usually has to say “yes” (if he does say it) at random, in the sense that, generally speaking, he can form no guess either as to the period at which he will be likely to have to act—assuming that he survives the testator at all—or as to the nature of the duties which he will have to discharge; and distance, if it does not lend enchantment to, at least removes disagreeable features from, the view. But when the same enquiry is made with reference to an intended settlement, it is quite a different thing. It may, of course, be that the duties of trustee will probably be *nil* for a considerable period of time, as for instance, where the settled property is entirely of a reversionary character. But in the large majority of cases the active duties of trusteeship commence at once, and it is therefore obvious that an intending trustee should accurately inform himself of what those duties are. He is very often foolish enough to do nothing of the sort, to say “yes” without a thought, and to execute the documents put before him with as much unconcern as if they represented nothing but a trifling matter of form, ranking in importance a little above the appointment of the bridesmaids and best man. But we are not concerned now with people

who do these foolish things, but with people who act with reasonable prudence and caution, and who, before committing themselves to the office of trustee, seek the advice of their solicitor; and I am anxious to assist you, if I can, to a right understanding of what that advice should be, and also of the practical guidance which may usefully be given at the later stage of a trustee's having agreed to accept or having actually assumed that office.

Liabilities of
the office.

Now, in the first place, no one who has ever read anything about the rules of equity can fail to arrive at the conclusion that the office of a trustee is very far removed indeed from a bed of roses—so far, that the simile of a plank-bed would perhaps be nearer the mark. He is responsible to the uttermost farthing that he possesses, not merely for the discharge of his duties without dishonesty or fraud, but for a thousand lesser degrees of failure which graduate to so fine a point that he is frequently fixed with grievous responsibility for an act absolutely devoid of moral blame, and which may only subject him to liability because he is judged by a remorseless standard of law, consisting of cases decided often on narrow issues by narrow-minded judges. In very modern days some attempt has been made to break in upon these traditions. The late Master of the Rolls—who was as conspicuous for his breadth of mind as for his profound knowledge—set his face resolutely against the harsh treatment of trustees in our Courts, and I remember hearing him express in Court only a few months before he died, in most emphatic terms, a hope that the office of trustee would in time cease to be attended with liabilities and responsibilities which made men of the highest integrity and business capacity shrink from accepting it. But the judge who expressed the hope has gone; the paradise for trustees which he pictured is not yet reached; and many more doctrines must be up-rooted and decisions

reversed than is likely to be the case in my day or even in yours before his words can be fully accomplished.

Therefore I say that if any client of yours who is asked to be a trustee has no special reason or binding cause to say "yes," if it is indifferent to him whether he accepts or declines, and the scale will be turned by the expression of an opinion from his professional adviser, then I conceive that your right course is to advise him to keep clear of the trust.

I must not omit, as bearing upon the propriety of that advice, mention of one point which is often overlooked at the time of entering upon a trust. It is easy enough to become a trustee, but often very difficult to obtain release from that position. Mr. Joshua Williams says on this point (*j*): "When a trustee has once accepted the office he has no right to retire, unless the person having the power to appoint another trustee in the event of his retiring should consent to do so; or unless from unforeseen circumstances the duties of the trust should have become more onerous than was contemplated by the trustee when he accepted the office." I ought, however, to say, in qualification of this passage, first, that it was written before the passing of the Conveyancing and Law of Property Act, 1881, the 32nd section of which has, in some small measure, facilitated the retirement of a trustee by providing that, where there are more than two trustees, one may retire without being replaced by a new trustee, where his co-trustees and any other person who may be empowered to appoint trustees shall consent to his doing so; and, in the second place, I venture to think that the circumstances in which a trustee may insist on retiring without consent are somewhat narrowly stated by the writer.

Difficulty of retiring from trust.

There are, in truth, only three modes by which a trustee can divest himself of that character:—

(*j*) Williams' Personal Property, 11th edit. p. 342.

First, by consent of all parties interested—a consent, however, which can only be given if they are *sui juris*.

Secondly, where there is some special power or provision in the trust instrument enabling him to do so. This would, of course, be conclusive, but such a provision is rarely found.

Thirdly, by application to the Court.

It is with reference to this third ground that Mr. Joshua Williams' observation appears to me to be a little misleading, and you will, I think, gain a more accurate view as to how the matter stands from the following passages which I have extracted from Lewin on Trusts (*k*):—

“The trustee may in every proper case, though the contrary appears to have been at one time supposed, get himself discharged from the office by the substitution of a new trustee in his place on application to the Court. . . . Where no new trustee can be found willing to act, the trustee's right to be discharged must depend upon the circumstances of the case. ‘It is a mistake,’ observed Lord St. Leonards, ‘to suppose that a trustee who is entitled to be discharged is bound to show to the Court that another person is ready to accept the office. . . . But if no one can be found who will accept the trust the Court may find itself obliged to keep the old trustee before the Court, but will take care to protect him in the meantime.’” Mr. Lewin then emerges from Lord St. Leonards' dictum, and observes:—“If a trustee wish to retire from mere caprice, it is not clear that the Court can or will discharge him, unless another trustee can be found in substitution. It is certain that the Court cannot divest him of the estate before someone can be found to take it; and, even as to the office, it is not unreasonable that if a man once engages to undertake

“ it, he shall not retire from it without any reason, and “ so leave the estate without a trustee.”

You will notice that Mr. Lewin does not express himself with much certainty, nor have I been able to clear up the point to my satisfaction on looking into the cases, but I think we may safely draw the conclusion, on the whole, that a reason, and, if I may use the expression, a reasonable reason must exist to enable a trustee to get discharged from his office, unless there happens to be a willingness on all sides to fall in with his wishes; and the fact that people who are prudent and well-advised are slow to assume the post often acts and reacts in the shape of rendering it difficult to replace an acting trustee with a suitable substitute. The foxes in the fable were not, as you will remember, persuaded by the fox whose tail had been cut off in a trap to undergo the same operation voluntarily, in spite of his glowing description of the pleasures which he had experienced from going without it.

But the preliminary advice of which I have spoken is sometimes out of place, or cannot from a variety of causes be followed. Few solicitors would advise a brother to refuse to act as a trustee of his sister's marriage settlement; and if A. has become B.'s trustee, and A. in turn finds himself in want of a trustee, he naturally turns to B. to fill the place with a confident expectation that the request will be acceded to. Such an obligation may well be expected to be mutual.

But, next, supposing this point to be got over in favour of an acceptance, the question arises, how far a proposed trustee should ascertain the nature of the trust before committing himself irrevocably to the actual terms of the particular instrument. I answer this by saying that he should most certainly gain this information fully and completely, and that he should do so, if possible, at the stage when the settlement is in draft, so that his solicitor may have the opportunity of considering whether it needs any modification in the trustee's

If office conditionally accepted, what information should be required.

interests. I have known a most important alteration to be made in the draft of a marriage settlement at the instance of an intending trustee. Again, the terms of the settlement may disclose trusts of an unusual or onerous character which cannot perhaps admit of modification by reason of the peculiar circumstances, or the character of the property. This observation applies with special force to voluntary settlements, which, as I have explained, are of all sorts and kinds; and it entails upon a solicitor the duty of pointing out to his client what are the special difficulties of the trust. He can only do this effectively by going carefully through the instrument and putting himself in his client's shoes, and where the terms of the settlement impose an exceptional measure of responsibility on the trustees, his advice may, I think, be summed up in this way:—
“The office of trustee is one which you will be wise
“to keep out of in any case in which you can do so
“consistently with good taste and kindly feeling, or a
“sense of moral obligation; but if you feel bound to
“accept it in this case, provided that there is no very
“onerous or unusual duty attaching to the trust, then I
“must point out to you that the settlement does entail
“special obligations upon you.” And you would then explain the nature of those obligations, express your views upon them, and afford your client all the materials for deciding whether to act or not.

A little careful thought on your part, which you will of course come to apply with greater facility as you grow in experience, will enable you without much difficulty to put your finger on any provisions of an objectionable character. If you carry your minds back for a moment to what I have said in treating of other points, you will recall the difficulties attaching, for example, to a trust of such a class of property as furniture; the objections, again, which apply to the importation of a power to purchase land into a settlement of personal estate, and the difficulties in which trustees may be placed

both by refusing and consenting to exercise such a power. As surely as any trust is in itself specially complicated or open to any serious question or likelihood of difficulty in the future, so surely must the acceptance of the office of trustee involve the assumption of a liability to special risk and trouble.

I should be very sorry to mislead you upon any point of conveyancing practice, and I would therefore again remind you of what I said at starting upon this subject, that trustees very often do not take the precautions to which I have referred. It is the exception, and not the rule, for the draft of a settlement to be deliberately perused on behalf of a trustee. But, on the other hand, it is very clear that if a client proposed to be made a trustee asks your advice as to the acceptance of the office you can give him no counsel really worth having unless the opportunity is afforded to you of carefully looking through the instrument, and you will act rightly in requiring to adopt that course.

With regard to such matters as are incidental to a trusteeship actually started—these, of course, in the widest sense, open an almost boundless field quite out of place in a Conveyancing Lecture. But there are two practical points within my limits on which I may fitly say a word in concluding this Lecture—the necessity of making proper provision as to the custody of the trust property, and of exercising discretion and prudence as to the mode of investment of the trust funds.

As to the first of these matters. If the property consists of Government stocks or inscribed funds of any kind, this will be a comparatively light responsibility, because the most important evidence of ownership is really represented by entries in books not in the trustees' possession. I am, of course, by no means suggesting that such documents as share certificates need not be kept with care, but only that they are, relatively

Matters
incidental to
trusteeship.

As to custody
of trust
property.

speaking, of much less importance than bonds payable to bearer, or title-deeds, or other evidence of ownership capable of being fraudulently dealt with. It is the duty of trustees to place all such documents in some proper place of deposit—such as, for instance, a banker's strong-room—under their *joint* control, and you cannot too often or too strenuously impress upon a trustee client—because nothing is more frequently disregarded, or so likely to bring a trustee to harm when it is disregarded—that the Court shows no mercy to a trustee by whose supineness or ignorance it has been placed in the power of a co-trustee to misappropriate trust funds. I know, of course, that in the nature of things the management of a trust very frequently falls upon the hands of one of the trustees to the practical exclusion of the others; three or four trustees, scattered perhaps all over the country, cannot and will not act together in every little detail. But the line of what is reasonable and right is overstepped at once when this is carried the length of placing the trust property bodily in the hands of one of several trustees. The Court holds—and rightly holds, if I may say so—that the *cestuis que trust* are entitled to what may be termed the joint integrity of all the trustees put together, and that they are not justified in remitting the beneficiaries to the powers of resisting temptation possessed by one of the trustees only. You will be doing valuable service to any trustee on whom you are able thoroughly to impress this important fact. A man may decline to be a trustee; he may hesitate long and anxiously before he accepts the office. But when he has accepted it he must discharge its duties, and he should be made to realize thoroughly that his responsibilities cannot be shifted on to the shoulders of others—that he holds a distinct individual position from the personal burden of which there can be no escape while he remains in the trust.

Next and last as to the investment of trust funds. The starting-point must obviously be this—that in no circumstances should trust money ever be invested in a security not falling clearly and unmistakeably within the power of investment conferred on the trustees by the trust instrument. That is an inflexible rule admitting of no variation, and a departure from it may be disastrous. But we may go a step further. Trustees are expected not only to adhere to the letter of the trust, but to use their discretion in the choice of securities, not so much from a strictly financial point of view, as with reference to any particular circumstances attending the investment, and I would specially impress upon you that large general words of indemnity and language wide enough to confer an apparently boundless discretion can never be relied on as over-riding the general principles by which the acts of trustees are judged, and absolving them from a proper and responsible performance of the duties of their office. Mr. Charles Davidson mentions (*l*) a case within his knowledge in which a most eminent conveyancer had advised that trustees authorized to lend upon any security, real or personal, in their discretion could not safely invest in railway bonds. That advice seems to savour a little of extreme caution, but it forcibly illustrates what I have been saying. The same writer mentions also that in a reported case of *Langston v. Ollivant* (G. Cooper, 33), in which trustees who were authorized to lend money on sufficient personal security lent it to a trader, the husband of the tenant for life, on his bond, the loan was held to be a breach of trust on the ground that it was made as an accommodation, and did not therefore fall within the trustees' authority.

The need of caution in the selection of investments applies in an especial degree to investments on real

As to selection of investment for trust funds.

(*l*) Davidson's Precedents, 3rd edit. Vol. III. p. 55.

securities. I had occasion, in another course of Lectures, to treat of this subject at some length in dealing with mortgages (*m*), and as I do not feel justified in repeating myself I will only say now that all the text writers, with Mr. Lewin at their head, concur in condemning the lending of trust money on second mortgage, by reason of the legal disadvantages which attach to the position of a second mortgagee; and that trustees are never justified in advancing on the security of any property of a speculative or unmarketable kind, such as unfinished houses, taverns, warehouses, and so forth.

Sound practical advice to clients on such points as these will often be of inestimable service to them, and you may be sure that a clear appreciation on your part of the considerations attaching to the acceptance of the office of trustee, and the doctrines applied to the discharge of its duties, will repay you a hundred-fold in the course of your professional career for any trouble you may have bestowed, as a student, upon the effort to gain it.

(*m*) Turner's Duties of Solicitor to Client as to Sales, Purchases and Mortgages of Land, pp. 222—227, 304.

SEVENTH LECTURE.



WILLS.	{	WHAT PROPERTY MAY BE LEFT BY THEM.
		WHO MAY MAKE THEM.
		THE FORMALITIES ATTENDING THEM.
		THE TAKING OF INSTRUCTIONS FOR THEIR PREPARATION.

SEVENTH LECTURE.



I PROPOSE, in this and my two remaining Lectures, to direct your attention to the subject of your professional duties in connection with the preparation of wills both of real and personal estate ; and I think that the most convenient plan for me to work upon will be, first, to deal with such matters as are more or less common to all wills, whether of real estate or personal estate, or both, and then to point out some of the special characteristics of bequests of each of those two great classes of property.

Subject of
Lecture.

The right of testamentary disposition in this country was once upon a time a plant of slow growth ; and if I felt at liberty to treat of historical rather than of practical topics I might, perhaps, succeed in exciting your interest by tracing its development. But the last landmarks of any restriction upon the right of a testator to dispose by will of property of any sort or kind were swept away nearly fifty years ago by the celebrated Wills Act, 1837 (7 Will. IV. & 1 Viet. c. 26), and however attractive the task might be to me, I do not feel justified in expending any of your time in reviving the lights of bygone laws and statutes only to extinguish them again, and tell you that their day is long past, and that they have no practical bearing now upon the professional duties of a solicitor.

Right of
testamentary
disposition.

I take, then, as my starting point, the third section of the statute to which I just referred, under which the power to dispose by will, both of real and personal

estate, is derived at this day. The short substance of the section is, that it gives a power of testamentary disposition over all real and personal estate belonging in law or equity to the testator at the time of his death; and that in the case of real estate the power is extended to estates of the nature of customary freehold, or tenant right, or customary, or copyhold, notwithstanding the omission on the testator's part to comply with certain formalities connected with property of such tenure, or any testamentary disability which might attach to the particular species of ownership but for the Act; and it is also extended to estates *pur autre vie*, contingent, executory and future interests, whether in real or personal estate, and even to such an extremely shadowy and intangible subject of ownership as a right of entry for a condition broken, or otherwise. In short, a man may leave by his will any conceivable sort of interest in property to which he may be entitled at the time of his death.

Competency
of testator.

But although all sorts of property may be the subject of bequests, all persons are not legally capable of making a bequest of any sort of property at all. No doubt when I mention the word disability the usual little legal family circle of infants, married women, lunatics, traitors, felons, and outlaws, will occur to your minds immediately as being the persons who, in all the text-books, are perpetually being presented to us in connection with legal disabilities; and, in the main, your surmise would be right. But the disabilities in the case of wills do not, as I shall show you, quite correspond with those which attach in the case of other written instruments.

Infants.

The disability of infants, as to their contracts, is, as you will no doubt remember, of a qualified description. In the case of wills it is (under the 7th section of the Wills Act) absolute, and without exception of any kind, other than perhaps the case of a soldier on active service,

or a seaman at sea (*a*). As it is highly improbable that you will be asked, professionally, to step into the middle of a battle or a bombardment to prepare the will of an infant soldier or sailor, the qualification does not seem of practical moment for my purpose.

With regard to married women, the 8th section of the Wills Act provided that no will made by a married woman should be valid except such a will as might have been made by a married woman before the passing of the Act. The statute, therefore, left untouched the law as it then stood, which amounted to this, that a married woman could dispose by will of personal property held for her separate use, and might exercise a testamentary power of appointment over real as well as personal estate; and she might also, if an executrix, appoint an executor to continue the representation. Whether she could dispose by will of real estate to which she was entitled for her separate use was a matter which, upon the authorities, was not free from doubt, but the doubt is not of moment now, as the testamentary powers of married women have been placed on a new and much enlarged footing by the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). The first section of that statute enables a married woman to dispose by will of any real or personal property, being her separate estate, in the same manner as if she were a *feme sole*, and the 2nd and 5th sections so widely increase the area of what separate estate is, as almost, but not, I think, quite, to justify a conclusion which is expressed in these terms in the 9th edition of Hayes & Jarman's Concise Precedents of Wills (p. 9):—
 “ Although a married woman obtains no new or different
 “ power to make a will than she possessed before the
 “ Act, the effect is, by making all her property separate

(*a*) Hayes & Jarman's Concise Precedents of Wills, 9th edit. pp. 8, 26, 27.

“ estate, to give her complete testamentary dominion as “ if she were a *feme sole*.”

I qualified my adoption of this passage, because, if you carefully study the 2nd and 5th sections of the Act, you will see that in declaring what property is to be considered separate estate, they do not include any real or personal estate, either in possession, reversion or remainder, of a woman married before the Act came into operation, to which her title also accrued before then. Supposing therefore, for instance, that a woman married before the Act became entitled, also before it came into operation, to a reversionary interest in personalty not settled to her separate use, her husband would clearly still have a right to it if it fell into possession at any time during the coverture, and it is, therefore, not quite accurate to say that *all* a married woman's property has been made separate estate by the Act, nor consequently that she has complete testamentary disposition, as if she were a *feme sole*, over all her property. Once satisfy yourselves, in any case, that you are dealing with separate estate, and you may take it that the right of testamentary disposition is now clear and absolute, but as to the property of any woman married before the Act of 1882 became law, make sure in the first instance, when you are considering the question of testamentary capacity, that the property to be dealt with is separate estate, whether by virtue of the Act or of some instrument impressing it with that character.

Lunatics.

Next, as to lunatics, the incapacity is clear when it is once established that the testator or testatrix was not of sound disposing mind, from whatever cause. The question of sanity is very often a matter of extreme difficulty to deal with. One writer has, I think, been good enough to express it as his deliberate conviction that every one is mad in some degree; and certainly in probate causes judges and juries often have an anxious

task to discharge in drawing the line between mere eccentricities and the degree of mental derangement which amounts to testamentary incapacity. In so far as a matter so full of uncertainty admits of any accurate definition, I think it may fairly be said—but in saying it I do not pretend to do more than express the best conclusion at which I have been able to arrive for myself—that the degree of insanity or mental derangement which will be sufficient to upset a will is a somewhat lesser degree than would have the same result upon a contract entered into by the same person, and that judges and juries are somewhat exacting in the tests by which a testator's capacity is judged.

There is another point, too, connected with the question of the soundness of a testator's mind, which does not depend upon any impressions of my own, but is a matter of established law—viz., that the presumption of sanity is not a presumption of law, but of mixed law and fact, and that although, when a will is attacked on this ground, the assailant must bring evidence to prove his case, yet the Court will require, first, to be satisfied of the testator's competency by those who support the will, so that the onus of proof can hardly be said to lie altogether upon those who oppose it. This principle was laid down in the case of *Sutton v. Sadler* (5 W. R. 880 and 3 C. B., N. S. 87).

I have no intention of stepping over my boundary and transporting you from the conveyancer's seat to the Probate, Divorce and Admiralty Division, but I have said thus much of the contentious aspect of this matter because it adds point to a practical warning which I am now going to give you, and which I am anxious that you should take to heart for your guidance at the stage of preparing a will and getting it executed.

The cases in which any question of insanity or mental incompetence present themselves to a solicitor as elements for consideration in the case of contracts are

very few and far between. Not so in the case of a will, because the conditions are altogether different. Contracts are made for the most part between men in the enjoyment of health and strength, or, at least, with all their faculties alert and unimpaired. Wills speak only from *the death*, and many people have a morbid disinclination to place on record their testamentary wishes until that event is within very measurable distance indeed. Hence it is that wills are often made in a last illness, and the intimate connection of mind and body renders it doubtful in some cases how far the even balance of the one may be disturbed by the sickness of the other. Again, it is a matter of common knowledge that a strong mind often gains an extraordinary influence over a weak one, and a testator, whether in health or sickness, may be making his will when his mind is so much under the control of others that he is deemed not to be in possession of sound disposing power. There is no more common ground of attacking a will than that of what is commonly called "undue influence." And, once again, it is a matter of observation in life that eccentricities of mind and character have a peculiar tendency to break out in wills—as, for example, in the love of making a will to-day only to revoke it a few weeks or days afterwards in favour of a totally different mode of disposition. I remember personally one instance in which a testator had made on four successive days residuary bequests, to different people, of property to the amount of about 200,000*l.*, and yet he had been a very shrewd and successful man of business, and had never come under a suspicion of insanity among those who knew him.

Now a little reflection applied to what I have said will show you that, in connection with this subject of a testator's competency, you may readily be placed, as solicitors, in a position of great delicacy and difficulty. You may be summoned to the bedside of a dying man

whose intellect is dimmed by physical causes ; you may receive instructions in circumstances which may lead you to the conclusion that the testator is acting under the influence of others to such an extent as to exclude his own free will altogether, or you may have reason to believe, from the testator's acts or wishes, that he is not of sound disposing mind ; and if in such a case you prepare a will in accordance with the instructions given to you, you may find yourselves afterwards assailed—perhaps in a Court of law—with all sorts of ugly insinuations by those who consider themselves to be aggrieved by the instrument.

What should you do, then, where any such elements of doubt exist ? You should emphatically walk with wary steps and preserve evidence at every turn that you did everything which reasonable prudence, and a nice sense of professional honour and uprightness, could suggest. If you are in doubt as to whether the state of the testator's health justifies you in carrying out his testamentary wishes, you may reasonably ask to be satisfied on the point by the opinion of his physicians ; and some practitioners in such circumstances make a point of insisting, if possible, upon the will being attested by a medical man as one of the witnesses. If you see good cause to believe that undue influence is at work, you will be wise to wash your hands of the matter altogether, rather than lay yourselves open to grave imputations upon your professional character. Perhaps the most difficult case to deal with is that in which the testator's acts and wishes are your only ground for doubting his mental competency. Of course, if a client who has a wife and children comes to you and says that he wishes you to prepare a will leaving all his property to the Emperor of Morocco, you will not have much difficulty in arriving at a conclusion as to the state of his mind. But I do not think that it is any part of your professional duty to form a judgment as to

the niceties of the dividing line between eccentricity and mental incompetence, and, so that you adopt all reasonable precautions, you may, I think, properly leave such matters to be raised, if at all, when the will comes into operation, by whomsoever it personally concerns to do so. Taking as an illustration the case which I just now mentioned, there is nothing to prevent a testator from changing his mind as often as he pleases as to the objects of his bounty, and in the absence of other special circumstances there is, I think, clearly no reason why you should not prepare in succession as many wills as a changeable and capricious testator chooses to be foolish enough to make.

I will only add on this subject that the best vindication which, ordinarily speaking, a solicitor can have where there is any suspicion of undue influence or weakness of intellect, will be written instructions under the testator's own hand. These, in conjunction with other facts, will furnish evidence of free will in the one case and (if in themselves reasonable) of mental capacity in the other; and, in the absence of special circumstances, depriving them of the importance which they would otherwise possess, they will go far to justify a solicitor who acts upon them, even if the conclusion arrived at as the result of litigation be adverse to the will itself.

Felons,
traitors and
outlaws.

I need not dilate upon the remaining disabilities of felons, traitors, and outlaws, because I do not imagine that you will ever be called upon to deal with them, and there is certainly no sufficient probability that you will to make it worth while for me to dilate upon them.

Formalities
attending a
will.

Having now considered what property may be bequeathed, and who is competent to make a will, let us next see what are the necessary formalities attending the instrument. To do so we must turn partly to statute law and partly to the established law and practice of the Probate Division of the Court, and I would observe here again as to the latter source of information

that I do not intend to touch upon any matter pertaining to the Probate Division, except in so far as it practically and directly bears upon the discharge of what I may term your conveyancing duties.

In so far as the contents of a will are concerned, it has been the aim of the Legislature and the Courts to dispense as much as possible with technicalities and to give effect to the intentions of the testator however crudely or imperfectly they may be expressed, if there be any reasonable means of gathering them from the document taken as a whole. I shall have more to say upon that matter at another stage of my Lectures, and I introduce it in a general way here only by way of contrast to my next observation, which is that, for reasons which commend themselves to common sense and prudence, the same tolerance of carelessness and ignorance has not been extended to the attendant formalities of the instrument. These formalities may be considered under the two heads of the mode of execution, and the mode of dealing with alterations and obliterations.

First, as to the mode of execution, there was formerly a difference in the requirements applicable to wills of real and of personal estate, but the distinction was done away with by the Wills Act, the 9th section of which says that every will must be in writing, and must be signed at the foot or end by the testator, or by some other person in his presence, or by his direction, and that this signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and that they must attest and subscribe the will in the presence of the testator, but that no form of attestation is necessary. Mode of execution.

Upon this section the late Mr. Joshua Williams, in his work on the Law of Real Property (*b*), justly observes that one would have thought it sufficiently clear,

(*b*) 13th edit. pp. 206, 207.

15 & 16 Vict.
c. 24.

and especially that part of it which directs the will to be signed at the foot or end, but that some very careless testators and very clever judges have contrived to throw upon it a discredit which it does not deserve. And he then proceeds to refer to the statute which has been passed by way of explanation on this point—15 & 16 Vict. c. 24. If you read this Act you will find that in a perfect labyrinth of words it declares that every will shall, so far as regards the position of the signature, be valid if the signature shall be in any one of a large number of laboriously enumerated places, and shall not be invalid by reason of the signature being in any one of several more laboriously enumerated places.

It is far from my purpose to encourage you to be careless as to the mode of getting a will executed, but I will just illustrate, by one curious example which came under my notice, the wide interpretation given to the testator's signature under these provisions. The Wills Act, as we have seen, simply uses the expression "at the foot or end." Among the tangled expressions in the later Act there are words which declare that no will shall be affected by, among other things, the circumstance that "the signature shall be placed among the words of the testimonium clause." In the case of which I speak the testator had omitted to sign the will at all in the proper sense of the term, but he had, in his own writing, and in the presence of the witnesses, put in an attestation clause which began "Signed by the testator, John Stiles, as his will, in the presence of, &c., &c." And the witnesses had signed. Upon an affidavit of the facts which I have stated probate was granted without even, I think, requiring the Court to be moved. It was, no doubt, considered that the case fell in terms, however unintentionally, within the provision as to placing the signature among the words of the testimonium clause.

Witnesses.

With regard to the witnesses, I am able to spare you

another lengthy disquisition upon the subject of competency. The only requirements are that there must be a bodily presence; and it is laid down in Taylor on Evidence (*c*) that there must also be a mental presence, and that the Act will not be satisfied if either of the witnesses be insane, intoxicated, or asleep, or, it would seem, even blind or inattentive at the time when the will is signed or acknowledged. To this I may add, that on the same principle it is laid down in Sir J. F. Stephens's Digest of the Law of Evidence that a minor may attest a will, unless incompetent from extreme youth to understand and testify.

There must, as you well know, be two witnesses at least. One will not suffice, and more than two are not necessary or desirable; and the witnesses must be present together when the testator signs or acknowledges. It is usual, and very proper, for the witnesses also to sign in the presence of each other—to do all the signing together in fact—and the ordinary form of attestation clause assumes this to be the case, but the statute does not, in terms, require this (*d*).

I dare say you are familiar with this attestation clause. It is not compulsory to have any attestation clause at all, but an attestation clause containing a sufficient statement of the fact of compliance with the provisions of the Act possesses this very important advantage, that when the time comes for obtaining probate, a special affidavit proving compliance with those provisions—which affidavit, if the death takes place long after the will is made, may not be by any means easy to obtain—will be necessary where the clause is absent, but not otherwise.

It is very probable that you may here and there during your professional lives have to prepare a will in some emergency, when it is impossible for you to turn

(*c*) 5th edit. p. 920.

(*d*) Hayes & Jarman's Concise Precedents of Wills, 9th edit. p. 85.

Attestation
clause.

to a precedent, and you cannot, therefore, too soon or too surely commit to memory the approved form of attestation clause to a will.

Legacy to witness.

Finally, as to witnesses, you must always bear in mind that, under the 15th section of the Wills Act, where any person attests a will to whom, or to whose wife or husband, any benefit is given by it, the attestation is valid, but the benefit will be absolutely forfeited. An odd instance of the application of that rule came across me some time ago. The will of a client of mine was executed in Paris very shortly before his death, and one of the witnesses was an old friend of his to whom he had left a gold watch as a little token of remembrance. The residuary legatee, as you may suppose, did not seek to take advantage of the technical failure of the legacy, and the watch was duly handed over. Some time afterwards, when I came to pass the legacy duty accounts, an astute gentleman at Somerset House discovered the fact that the legatee and witness were identical, and insisted on the payment of legacy duty by the residuary legatee on the value of the watch, upon the ground that the legacy had lapsed and the watch had fallen into the residue. Had the legacy taken effect no duty at all would at that time have been payable, because the value of the watch was something under 20*l*. The contention was not noble, and it made me very unphilosophically indignant at the time, but it was legally right, and, after expressing my views to one official after another on a sort of ascending scale of appeal until I got to the top gentleman of all and poured out my soul to him in a final peroration, I had to submit to the payment.

Obliterations, interlineations, and alterations.

I turn now to the other branch of this head of my subject—the mode of dealing with obliterations, interlineations, and other alterations in a will, all of which, to avoid needless repetition, I will call alterations.

Should be

Now the first piece of advice to give on this point is,

I think, the obvious truism that you should, as far as possible, avoid having any alterations at all; and I would certainly go the length of saying that, where you have the opportunity of doing so, it is much better to have all or part, as the case may be, of a will re-copied when it has to be altered before execution, than to have it executed with any considerable number of alterations in it, and especially where they are of material importance. But it is not always practicable to act on this plan, and it is therefore essential that you should be thoroughly aware of the view which the Court takes of alterations in a will presented for probate, so that you may know exactly what your own duties are in the matter.

The law as to the effect of alterations made *after* the execution of a will is to be found in the 21st section of the Wills Act, by which such alterations are made invalid, and are omitted from probate, unless they have been afterwards executed and attested in the same way as the original will.

When omitted from probate.

In order to give effect to this enactment, the duty is of course cast upon the Court, whenever an alteration appears in a will, of determining whether or not as a matter of fact the alteration was made before or after the will was executed. If afterwards, then the alteration cannot be admitted to probate, unless it has been executed and attested as required by the 21st section; if before, it will be incorporated in the probate. In the discharge of this duty the Court acts upon certain recognized principles and rules, which may, I think, shortly be expressed in this way:—

First, the presumption is against the alterations; they will be taken to have been made after execution in the absence of evidence to the contrary (*e*).

Rules of law applicable to them.

Secondly, this evidence may be sufficiently given in

(*e*) Hayes & Jarman's Concise Precedents of Wills, 9th edit. p. 38.

ordinary circumstances in any one of the following shapes :—

An identification of the alterations by special reference made to them in the attestation clause ; or

The signatures of the testator and witnesses, or, it seems, the writing of their initials (but the latter only in the case of small and unimportant errors) in the margin of the will near the alteration (*f*).

These two methods, as you will notice, affect the conveyancer's duties directly. Those which follow do not do so, but I mention them to show the trouble and difficulty to which a careless omission of both of the other precautions may give rise. They are :—

An affidavit of the attesting witnesses ; or if that direct evidence is not available, then any other evidence which will rebut the presumption. A strong illustration of the sort of evidence admitted under this head is furnished by the case of *Dench v. Dench* (46 L. J. R., P. M. & A. 14), where Hannen, J., said : “ It is clear “ that, when the Court has to determine whether alterations on the face of a will have been made before or “ after its execution, statements of the testator before “ the execution may be given in evidence with a “ view to shew that the intention which he expressed “ his determination to carry out would not be carried “ out unless the alterations in question were made.”

Practical
conclusion.

I need hardly add that when those who propound a will are obliged to rely on such a slender thread as evidence of statements made by the testator before executing the will to support the admission of important alterations to probate as part of the will, there is a very considerable risk that the thread may snap ; and the alterations — remember this — may be excluded simply because a recognized precaution which would not be known to the client, but should be at the fingers' ends

(*f*) Browne's Probate Practice, p. 122 ; Coote's Probate Practice, 7th edit. p. 86.

of his solicitor, was not adopted when the will was executed. In saying that, I, of course, refer only to those cases in which the alterations are made by or under the eye of a solicitor, and not to the amateur proceedings of a testator who is silly enough to dispense with professional assistance.

We have now filled in what I may term the ground-plan of my subject, and may proceed to examine the important duties which are bound up in the task of preparing a will in respect of its actual contents.

Duties attaching to preparation of a will.

Now I am very far from saying that, in order properly to discharge his professional duties, a solicitor must needs be a consummate master of the art of draftsmanship of wills, in the sense of being able to give effect to a complicated scheme of testamentary disposition with no other aid than the knowledge which he has acquired. On the contrary, the immense responsibility involved in the preparation of a will—immense for this reason, among others, that when once the instrument has taken effect no mistake in it can ever be set right—renders it most necessary that a solicitor should avail himself of every assistance that he can obtain in point of draftsmanship. And while there are many wills so simple in character that the question as to any one of them whether or not it shall be settled by counsel is a matter in which personal choice, the value of the property disposed of, and the testator's willingness or ability to incur the additional expense, may well be elements for consideration, there are, on the other hand, also many wills as to which it is a sheer act of folly for a solicitor to undertake the sole responsibility of preparing them, unless he has great confidence in his own skill as a draftsman, or some very special reason for not having recourse to the assistance of counsel.

Actual draftsmanship.

But the actual preparation of a will is not all or, perhaps, half the battle. A good book of precedents, experience in draftsmanship, the services of counsel, all

Knowledge
requisite for
draftsman.

or any of these may in any particular case carry you safely over the stile in so far as that matter is concerned ; but there is an earlier and most important stage at which a client often looks to his solicitor for advice and guidance, and this advice and guidance I most emphatically assert that no solicitor is competent to give unless he has mastered the broad principles of law which relate to wills, and, over and above them, has studied and thought out the subject, in its general bearings, by the light of the experience gained from what he has seen in books and in the everyday world around him. I fear that I must sometimes weary you with that expression "broad principles," but I risk doing so in my desire to impart to you, if I can, some part of my own boundless faith in the wisdom of a solicitor's becoming a master of the fundamental settled principles of law as distinguished from the smaller refinements which shoot out on all sides of them, and which we may well be excused from carrying about in our heads.

It is from this point of view that I wish to approach the more difficult part of my subject on which we are now entering. There is a vast deal of useful knowledge which I cannot hope to squeeze into our allotted space, but at least I hope that what I do say may be directed to the most important matters. Let me add here that I have now passed the stage indiscriminately common to real and personal estate, and shall frequently have occasion to speak of one class of property to the exclusion of the other.

As to client's
instructions.

There are, of course, testators and testators. I pointed out in an earlier Lecture that some people who are entering into partnership will bring to their solicitor a more or less well-considered scheme, while others will come to him and practically say, "We are going into partnership—please prepare an agreement for us." So in the case of wills ; some testators know exactly what it is

that they want to do, and others have only a very shadowy idea of their own wishes. It is a literal fact that a client of mine, when instructing me to prepare a will for him some time since, altered his views two or three times in the course of one interview as to the ultimate destination of one-half of a residuary estate which I calculated to be worth from 70,000*l.* to 80,000*l.* He was a clear-headed able man of business, and not at all eccentric in his habits; but he had no children, did not seem to be very keenly fond of his relatives, and really did not appear to me to care much about the matter one way or the other. The result was that in the end he practically left the decision to me. I should have been glad to propose myself as a deserving object, but I did not see my way to do so.

You must be prepared, therefore, to deal with all sorts and conditions of testators and to give advice, going much beyond your strict function of a legal adviser. Indeed, it is perhaps hardly an exaggeration to say that in a large number, if not the majority, of cases the bequests of a testator are more or less influenced by his solicitor.

How, then, may you best discharge yourself of this task? Briefly by first informing yourself thoroughly of all the facts, and then applying to them the acumen and intelligence of a trained mind.

I can best show you what I mean by working out an example, and we will take the most common of all cases—that of a testator who has a wife and children and desires to make provision for them by will. Beyond that general wish he has not perhaps thought out the subject at all before coming to you.

Illustration
selected.

In these circumstances there is one general rule which to my mind it is important that you should always keep before you as your starting-point. We have seen that all wills speak from the death. I would apply that rule of law as being also a rule of conduct and say that the provisions of a will should be framed from the point of

Wills should
speak from
death in fact
as in law.

view that they should for the most part shut out the testator's after-life, as if the making of his will were in truth really his last earthly act, and his testamentary dispositions were intended to operate upon the then existing state of his affairs. No doubt it may be true that a man sometimes makes his will to-day when he has 10,000*l.* worth of property, and may afterwards increase his fortune to 100,000*l.*, but omit to make a fresh will, and die twenty years hence, leaving testamentary dispositions which do not give effect to what, it may be presumed, would have been his wishes in the altered state of his affairs.

But, as a general rule, it is not possible to make accurate allowance for the future in preparing a will, and, moreover, the culpable carelessness of some testators cannot make a rule for others. The true principle I take to be this—that if a man seeks by his will to scan the unknown future, and assume that he “shall not die, but live,” he is doing a very rash and foolish act, which may bring much trouble and injustice in its wake; while, on the other hand, if he makes his will by the light of his present position and family surroundings, the worst that can happen, in the event of his afterwards living long enough for them to be materially altered, will be that it will be necessary for him to make a fresh will, or, as the case may be, to add a codicil to the old one. I put that general reflection in the front, because it affects the whole aspect of the matter.

Information
as to testator's
property.

Well, then, approaching the subject from this point of view, you would ascertain as accurately as possible—I do not mean to a question of shillings and pence, but in round figures—the extent of the testator's means, and, in so far, if at all, as they are represented by real estate, the precise tenure by which the testator holds it.

Considerations
as to
real estate.

Next, if there is real estate, you will present to the testator's mind the important question whether he desires it to descend as realty—as, for instance, by way

of entail—or whether, for the purposes of his will, he desires to impress it with the character of personalty and blend it with his personal estate, in which case you will give effect to his wishes by the aid of trusts for conversion, to which I shall hereafter more particularly refer.

If the testator, having real estate, desires so to devise it that it will retain that character, you would ascertain whether it is subject to any mortgage, and, if so, whether he desires that the real estate shall bear the burden of the mortgage, or that the incumbrance shall be discharged out of his personal estate.

Intended
objects of
will.

The next point to clear off would be the question whether or not any settlement was executed on the testator's marriage, and, if so, what are the precise limitations of the property comprised in it which will take effect upon his death, and how far they bear practically, in so far as the beneficiaries are concerned, upon the proposed dispositions by his will of property not comprised in it; and, again, whether by the settlement he has any power of appointment which he may and should exercise by his will.

Relevancy of
marriage
settlement.

By these steps you would reach the point of being fully informed as to what the testator's property consists of, what are his general views as to his real estate, and how far (if at all) the disposition of both real and personal estate must be considered side by side with the provisions of his marriage settlement; and, having got so far, you would appropriately gather some information as to the intended objects of the will.

If the testator has a grown-up family you will readily see that their several circumstances may greatly affect the provisions of his will when compared with the case of his children being of tender age.

Intended
objects of
will.

To begin with, the position of matters in this respect may have an important bearing upon the nature of the provision to be made for the testator's widow. It is one

Considera-
tions bearing
on this part
of subject.

thing when the result of the testator's death is to leave a widow with a family of young children to bring up and educate ; it is another thing when the children are already grown up, and all, or some of them, have gone out into the world.

Again, as to the children, if they are grown up, some may have prospered, or received accessions of fortune from outside sources, and others not, and the testator may think it right and just to discriminate between them with reference to that circumstance. Or, yet again, he may be influenced by the fact that he has already made advances in the shape of laying out capital to embark a son in the world, or by making a settlement on the marriage of a daughter.

Limitation of
wife's interest
to widow-
hood.

Some testators, out of regard for their children, and others, perhaps, from a desire to preserve the remembrance of themselves, even by means of a somewhat uncomfortable sort of testamentary monument rather than not at all, like to provide that the widow's interest shall determine in the event of her re-marriage. Of this restriction it has been observed (*g*) that the life interest of the widow is frequently made to cease on her marrying again, where the testator has children, to whom such an event might be prejudicial, but that otherwise, perhaps, the restriction is not to be recommended. I think myself that the "perhaps" might with advantage be left out of that passage, and while it is a matter which a testator is perfectly entitled to decide for himself, I feel sure that you will act wisely in throwing your influence into the scale, where you have the opportunity of doing so, against any attempt to legislate from the grave over events about the wisdom or folly of which, in a particular case, the testator cannot possibly form a sound opinion during his life-time, and, so far as we are aware, has no opportunity of forming, or, at all events, of expressing it afterwards.

(*g*) Haye & Jarman's Concise Precedents of Wills, 9th edit. p. 521.

One other point as to the testator's widow. To a layman making his will, and providing by it for his wife, it may very well not occur that she may be placed in a difficulty as to meeting many special expenses immediately following upon her husband's death, and by which, even if her income is available to her, she may be severely crippled for a while. To meet an emergency—which, indeed, can hardly be called an emergency, because it is almost a necessary result of the situation—it is wise and right to bequeath to the widow a pecuniary legacy to be paid as soon as possible after the testator's death, of fitting amount, according to his means; and the propriety of doing so may well be suggested to a testator, who is very likely to overlook the point, by his solicitor.

Immediate money legacy to wife.

In considering the question of capital and income in our supposed case, I think it may be said that general experience points to the wisdom of not giving to a wife or daughter the control over capital, and on the other hand, of not putting any fetters on the enjoyment of capital by a son, other than the attainment by him of an age at which he may be supposed to have learnt how to make proper use of it. Exceptions to this rule, of course, occur—rarely in so far as the first branch of it is concerned; less rarely, perhaps, in the case of a son who may, in his father's lifetime, have given proofs of his being unfit to have the control of capital. In the application of the rule it is, I think, the wise and approved plan to make, as it were, a settlement of a daughter's share in the will, by declaring trusts which secure to her the benefit of the income in all events, and make proper provision for the ultimate destination of the capital in the alternative events of her marrying and of her remaining single.

Control over capital to sons—not so to daughters.

The adjustment of a testator's property as between his wife and children is a matter which admits of much variety of opinion, and although a solicitor may with

Adjustment of interests as between wife and children.

propriety point out the alternatives that are open, and their relative advantages and disadvantages, it is eminently a matter for a testator's own decision as to which plan he will adopt. He may have such boundless confidence in his wife as to insist on leaving everything he possesses to her, in the faith that she will make wise and prudent dispositions for the children, whether to take effect wholly or partly during her lifetime or at her death. Perhaps I need hardly say to you that few solicitors would be found to advise such a plan, and that no testator who has at heart the interests of his children, as well as of his wife, can prudently adopt it. He may give his wife a life interest in everything, and make provision for his children only to take effect after her death, and in doing so he may attach to the wife's life interest an obligation to maintain and educate his children, or he may be content to trust to her maternal solicitude. And once more he may divert to his children some portion of the capital or income of his property during his wife's lifetime. These are the leading alternatives, and in drawing your attention to them I would point out at the same time that, while the question whether a testator's wife should enjoy a life interest in the whole of his property is one which he must determine for himself, it is obvious that the extent of his means, the degree of confidence which he has in his wife, the period of life at which his wife and children have arrived, and the personal fortune, if any, of the wife, and any special circumstances bearing upon the particular case, should be important factors in the calculation. A man who has an income of 10,000*l.* a year, and whose children are grown up, may well divert a considerable part of the income from his widow for the benefit of his children. But if his means are very moderate, and his income perhaps dependent for the most part upon his personal exertions, so that upon his death his widow may be

barely able to live in comfort, with or without the burden of maintaining his children, as the case may be, upon the whole income of the provision which he has been able to make for his family, it is equally obvious that in ordinary circumstances a life interest in the whole should be given to her.

Turning from the wife and children in their relative positions to the children as a separate subject, it is matter for observation that there is on the part of testators—though less so perhaps than formerly—a tendency to prefer males to females, in the sense of making a great disparity between them in testamentary bequests. It is intelligible enough that, where it is desired to keep up some great estate, the son to whom it falls should be clothed with the means of doing so, and it may be a social necessity that he should overshadow his brothers and sisters in consequence, though that doctrine is rather noisily attacked in our day. But why the same principle should be applied, as between sons and daughters, in the absence of any special reason of that kind, I personally fail to see. To me it seems that, other things being equal, a daughter, to whom so few avenues of active employment are open, should certainly not stand in a less favourable position than a son who has the world before him into which he can plunge and fight with the rest. There may be a transparent fallacy in that opinion, and I do not in the least wish to force it upon you; but the point has struck me so often that I could not forbear to mention it, and if you are led on reflection to dissent from it, you will not at all events have taken any harm from thinking about the matter, as it is one upon which you are very likely to be asked to advise a client one of these days. I will only add, as an extreme illustration of what I mean, that not long since an example came under my personal observation in which a testator bequeathed to each of his unmarried daughters (who had lived with him in great luxury and on the

Gifts to children as a separate subject.

best possible terms) a sum which produced 200*l.* a year, while among his sons, who were already very well-to-do in the world, he left a residue which represented an income of some thousands a year to each.

Special provisions as to testator's business and foreign property.

Equally in the case which I have been supposing hitherto of a will made for the benefit of the testator's wife and children, as in all other cases, it is important to consider whether the testator's position with regard to his business renders desirable any special provisions in his will, and from this point of view, in addition to ascertaining the extent of his means, you would act rightly in gaining information as to the sources from which they are derived. Is he in partnership, and if so, on what terms, and what will be the immediate effect of his death? Is he carrying on any trade or business alone, and, if so, how far may it be made available as an asset of his estate? May it be practicable to sell it as a going concern, or is it of such a nature that it may be carried on after the testator's death for the benefit of those interested under his will? Has he any property abroad, and if so, on what plan is it managed, and how may it best be dealt with after his death? On all such points as these the first thing is to learn what are the facts, and the next thing to put the testator's mind into the train for enabling him to instruct you as to his wishes. When you are in possession of them it will be a matter of draftsmanship to give effect to them, within the limits which are practicable, by clothing trustees with discretionary powers applicable to the particular circumstances.

Variations of the selected illustration.

I have presented to you an illustration of one class of will only, and of course there are many others. The testator may be a bachelor, a widower, a childless man, or the intended will may be that of a married or single testatrix. But many of the considerations to which I have referred apply some to one, some to another, and some to all of these different classes of wills, and you

will not, I think, have any great difficulty in shifting their application to altered circumstances, while they will also, I hope, give you some general idea of the point of view from which in all cases this part of your duties should be approached.

It may seem to you that the ground which I have hitherto covered in treating of the contents of a will has been that of will-making rather than will-drawing, and the impression would be a just one. But I have not, I think, wasted your time in working out with some elaboration the incidents which arise at the stage—*anterior to actual draftsmanship*—of your receiving instructions for a will. In the first place, you cannot properly prepare a will until you are, so to speak, saturated with instructions covering the whole ground of it. And, in the second place, I would again impress upon you that, while the points to which I have drawn your attention are matters of which the testator himself is the arbiter and which he *may* decide for himself quite irrespective of, and, it may be, quite at variance with, your own opinion of what is just or prudent, yet there are many cases in which, for all practical purposes, he will rely like a child on your judgment; and there are few cases—I pray you to mark this—in which he will not attentively listen to any views which you may, within the limits of delicacy and propriety, express to him; and even where he does not adopt them, you may depend upon it that you will not lose in his estimation by showing that you bring to bear upon the discharge of your professional duties the judgment of a reflective man of the world as well as the technical skill of a lawyer.

Having said so much by way of vindication of the lines on which I have travelled in this Lecture, let me add that I propose in my two remaining Lectures to ask you to follow me into technical regions in which most clients are left behind in a state of total inability to follow the why and wherefore, though they may, to some extent, comprehend the result.

Conclusion.

EIGHTH LECTURE.



WILLS <i>(continued).</i>	{	MATTERS OF DRAFTSMANSHIP :—
		GIFTS TO CHILDREN OR ISSUE.
		PERPETUITIES.
		ACCUMULATION OF INCOME.
		CONVERSION.
		THE WILLS ACT.
		PRECATORY WORDS.
		PERIOD OF PAYMENT OF ANNUITIES AND LEGACIES.
		LEGACY DUTY ON ANNUITIES AND LIFE INTERESTS.

EIGHTH LECTURE.



IN my Seventh Lecture I directed your attention to the right of testamentary disposition, both as to the classes of property which may be left and the legal competency of individuals to bequeath them; the formalities attending the execution of a will; the rules of law which bear on the subject of obliterations, interlineations, and alterations in it, and the practical lessons to be drawn from them; and, lastly, the considerations, dependent partly on principles of law and partly on policy and worldly wisdom, which should govern you in the discharge of the important task of taking instructions for the preparation of the instrument.

Résumé of
Seventh
Lecture.

IN my two remaining Lectures I purpose to deal with the less attractive, though not less important, subject of the points which it behoves us to bear in mind at the stage of actual draftsmanship.

Subject of
remaining
Lectures.

Probably there is no more fertile source of litigation than limitations in wills intended to define the interest to be taken by the children or issue of specified persons. The difficulty of construction to which such bequests give rise originates, no doubt, most frequently—as is also true of all other difficulties in the construction of wills—in the case of instruments prepared without professional aid, but by no means exclusively in those cases; and it may arise, moreover, so very easily from the least want of clearness and accuracy of language, that it is one against which you should most carefully guard. Decisions, so to speak, lie heaped round almost every possible form of words that can be used to express such a bequest, but cases still arise almost every day which

Limitations
to children or
issue.

present just that hair's breadth of difference from some other decided case to furnish an argument for distinguishing and applying a different construction to them, and you cannot take up a volume of reports without coming upon some new decision, of which at first blush you would say, "Surely this point has been decided over and over again."

It would be quite out of my power, in the compass available to me, to enter into the minute intricacies and refinements of this subject, which are legion in number and exceedingly complicated in difficulty; nor do I think that you would derive from my doing so any great benefit as conveyancers. It is one thing to have before you a will which has taken effect, and as to which you have to consider, or to instruct counsel to consider, or, if need be, to invoke the aid of the Court to determine by the light of a number of reported cases, the construction of a clause which is difficult, because it is badly drawn; and it is another thing to store your minds with sound rules and principles, in order that you may not yourselves prepare ill-drawn clauses. To construe a will it is often needful to examine the authorities almost with a legal microscope: to prepare one so that it shall not have to be hereafter subjected to that operation calls for no such minute intricacy of verbal comparisons.

We shall therefore, I think, better occupy ourselves with the general lessons taught us by the authorities as a whole than by any attempt to dissect them.

Now, from this point of view, I think it may be said that the two great points which the draftsman of a will should have clearly in mind, when framing a bequest in favour of children or issue as a class, are these:—

The two main points in framing such bequests.

First, what are the precise limits, in point of time and class, within the four corners of which the objects of the bequest are intended to be included?

Secondly, if the enjoyment of the legacy is to be deferred by the will to a period subsequent to the

testator's death, is the vesting of it also to be postponed? Upon the answer to this important question it will depend whether, if the legatee dies after the testator but before the period at which he would succeed to the enjoyment of the legacy, it will fall back into the testator's estate, or whether, although the legatee has not lived to enjoy it, it has become his vested property and will pass to his representatives.

There is also a third point, not comparable in importance with the others, but still quite worthy of mention in their company:—If the answer to the second question is, that the vesting, as well as the enjoyment, is to be deferred, what is to be done with the income during the period of suspense?

Third point
of minor
importance.

The consideration, even in the broadest sense, of the two main questions which I have suggested takes us on to difficult and slippery ground, but it is evident that they are questions as to which you ought to be alive to the necessity both of asking them, and of expressing the testator's wishes, when you clearly understand them, in language which will surely accomplish his object.

With regard to the first question, there are passages scattered in Jarman on Wills (*a*) which state the result of the authorities as clearly and concisely as the circumstances will permit, and I cannot do better than quote them to you, with some few comments of my own, which may perhaps assist you to follow the writer's meaning. These are his propositions:—

The first main
point—ascertain-
ment of
class.

First, an immediate gift to children, whether it be to the children of a living or a deceased person, and whether to children simply, or to all the children, and whether there be a gift over in case of the decease of any of the children under age or not, comprehends the children *living at the testator's death* (if any), and those only.

Propositions
as to this
point stated
and illus-
trated.

(*a*) Vol. II. p. 126 *et seq.*

That sounds rather a severe paragraph at first blush, but a very little reflection will make clear to you the meaning of it, which I take to be this—that if by my will I leave a sum of 1,000*l.* to the children of my friend John Smith, the children of John Smith entitled to share will be those, and only those, who are living at the time of my death, and this result will equally follow, even where, instead of calling them the children of John Smith, I refer to them as “all the children of John Smith,” or again, where my will contains a gift over to take effect in case of the decease of any of John Smith’s children under age, which latter expression might seem to point to my intention to include all his children who attain twenty-one, whether living at my death or not.

The second proposition is this :—

Where a particular estate or interest is carved out with a gift over to the children of the person taking that interest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution.

This proposition serves, you see, to show us that if, in the case which I just now supposed, I had given a life interest in the 1,000*l.* legacy to John Smith, followed by a gift of the corpus to his children, not only the children of John Smith who are living at the time of my death, but also any children of his who are afterwards born, will be entitled to share in the legacy.

The third proposition is, that where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply not only to those who are living at the death of the testator, but also to those who come into existence before the first child attains that age—*i.e.*, the period when a share of the fund becomes payable to any one object or member of the class.

This means in our supposed example that if I give a legacy of 1,000*l.* to be divided among the children of John Smith on their attaining the age of twenty-one, the legacy will be divisible between the children of John Smith living at my death who have then attained, or who afterwards attain, twenty-one, and any other children of his who may be born after my death, but before his eldest child attains the prescribed age. Of course, upon this principle, if at the time of my death any child of John Smith has attained twenty-one, his after-born children would be excluded.

I was rather puzzled at first to know why the line should be drawn at the exact point of children born before the eldest living child attains twenty-one; but it is really referable to a sufficiently plain reason. The will has in effect said that any child of John Smith who attains twenty-one is to share there and then in the legacy. But how can he do so if, when he reaches that age, it is uncertain of how many objects the class will consist at the most? If he is to wait until it is seen whether John Smith will have any more children, it is practically deferring the ascertainment of his proportion, not merely until he attains twenty-one, but until John Smith dies. Consequently, the rule comes in and says, "The first child who attains twenty-one fulfils the condition attaching to him, and is entitled to immediate enjoyment of his share. That share cannot be ascertained when he is twenty-one, if children born after that date are to be let in to disturb the fractional proportions in which the legacy is divisible. Therefore the testator must be taken to have intended that the line for ascertaining the number of the class should be drawn at the point at which he has said that a legatee is to take his share."

The fourth proposition is this: With regard to immediate gifts, it is well settled that if there be no object *in esse* at the death of the testator the gift must embrace

all the children who may subsequently come into existence by way of executory gift; and with regard to gifts preceded by an anterior interest, the weight of authority is in favour of the position that in all such cases, except in the instance of a legal remainder of real estate, if there is no object at the time of the vesting in possession, all the children subsequently born will be let in.

Applying our illustration to each of the two branches of this proposition, it will work out as follows:—First, if I leave 1,000*l.* to the children of John Smith, and there are no children of John Smith living at my death, his after-born children, if any, will all be entitled to share in the legacy, by way of what is termed executory gift. Secondly, if I give John Smith himself a life interest in the 1,000*l.*, and, subject to that life interest, I leave it to the children of James Smith, if at the time of John Smith's death James Smith has no children, all children of his born subsequently will share in the legacy. I have shifted this second illustration to the children of another person for the obvious reason that John Smith cannot have a family of children after his own death.

The fifth and last proposition is as follows:—

“Where the words ‘to be born’ or ‘to be begotten’ are annexed to a devise or bequest to children, if the gift be immediate so that it would but for the words in question have been confined to children (if any) in existence at the date of the testator's death, they will have the effect of extending it to all the children who shall ever come into existence.”

The meaning of this proposition I take to be this, that if, to use our illustration once more, I leave 1,000*l.* to the children of John Smith and add any such words as “to be born” or “to be begotten,” the addition of those words will negative the application of the first proposition and make the legacy distributable between all the

children of John Smith, whether born before or after my death.

These five propositions all have reference to the first point which I pressed upon you—the ascertainment of the objects of a legacy to a class of children. My second point, as you will remember, has reference to the period of vesting of such a legacy, upon which, as I pointed out, will depend the question whether, if a legatee dies before the period for payment has arrived, the legacy will pass to his representatives or fall back into the testator's estate.

Second main point—period of vesting.

As to this also, certain propositions have been established by the authorities, which, so far as the subject admits of it, are very clearly and concisely stated in one of Mr. Prideaux's excellent dissertations (*b*), substantially in the following terms:—

(1) Where there is a gift complete in itself, with a direction superadded as to the time of payment, as if a legacy is given to the children of A., to be paid to them as and when they shall respectively attain twenty-one, the legacy vests immediately, and the payment only is postponed.

Propositions as to this as stated by Mr. Prideaux.

(2) Where the time of payment is annexed to the gift itself, or where there is no gift except in the direction to pay or divide—as, for example, where a legacy is given to the children of A. when they shall respectively attain a certain age, *and there is nothing more*—the legacy is contingent.

(3) Very slight circumstances in the context will alter the construction, particularly where the bequest is of a residue, and not of a legacy merely. Thus, if a legacy is given to a person “at” or “when” he attains a certain age and is accompanied by a gift of the interest in the meantime, or by a direction to apply such interest, or any part thereof, for his maintenance,

(*b*) Prideaux's Precedents, 12th edit. Vol. II. pp. 373—376.

or if the legacy is directed to be immediately separated from the estate, the legacy vests at once.

(4) Where the payment of the legacy is postponed for the convenience of the estate—as if a legacy is directed to be paid to A. after the decease of B., to whom a life interest is bequeathed—A. takes a vested interest on the testator's decease, the payment to A. being postponed only for the purpose of enabling B. to enjoy a prior life interest in the legacy.

From the refined subtleties of this subject it naturally follows that in almost every case of construction which arises as to the period of vesting of a legacy ingenious advocates are able to adduce plausible arguments in favour of whatever view it is their professional duty to advance, and the law reports bear copious witness to the result.

Key-note as
to this point—
intention.

Honey-combed as the law on this point is with decisions, a broad principle is both difficult to gather and dangerous to trust to, but, at least, I will venture to point out for your guidance, as draftsmen, that the key-note is *intention*. A testator is at perfect liberty, within the limits of the rule against perpetuities, to which I shall presently refer, to defer the period of payment of a legacy, while permitting the legacy to vest at once, or, on the other hand, to make the right to the legacy, and not merely the period at which it is to fall into possession, depend on a future event; and whenever the Court has to find out whether he has done the one thing or the other, its endeavour always is to gather, as far as possible, from the instrument what the testator's intention was. No doubt, in doing this, a judge who decides a case to-day is much fettered by the decisions of other judges, by which a particular construction has been applied to a particular form of words, and may feel bound to follow an authority which does not commend itself to his own mind. But the qualification only amounts to this—that, for the sake of

uniformity of decision, if a given phrase has received from the Court, in one case, the construction that the testator must have been supposed to mean so and so, it is opposed to our system of jurisprudence that another judge should apply to precisely the same phrase, where there is no distinguishing context, a totally different construction. I say advisedly where there is no distinguishing context, because it is a rare thing to find two cases upon the construction of wills so identical that one is, in all respects, governed by the other. One of the greatest judges that ever lived—the late Sir George Jessel—used constantly to lay stress upon this fact, and his custom, when he had to construe a doubtful will, was to bring his masterly intellect to bear upon the instrument before him without troubling himself much with what any other judge had said about any other will, except in the few instances in which the case cited was directly and unmistakeably in point, and even then I am bound to add that where the decision was only that of a judge of first instance he treated it with scant ceremony if his own views did not lean in the same direction.

The testator's intention being thus the key-note, the draftsman's aim must be to express that intention clearly. It will not do to attempt this task by the light of nature, but it will, at least, serve you in good stead to remember that the starting-point is to be quite clear as to what the testator means, and then to turn to some approved precedent and find the precise approved terms in which to give effect to his wishes. There is no great difficulty in doing this, because, although the doctrines as to the vesting of legacies are, as I have said, full of refinements, there are well-settled forms in which, beyond a possibility of question, the period at which a legacy is to vest may be defined in accordance with a testator's wishes. It cannot, I think, be doubted that the cases of disputed construction arising upon wills prepared by lawyers are traceable in part to carelessness

The practitioner's duty.

in thoroughly grasping the testator's wishes, and in part to carelessness in resorting to the use of the right form of words to fit the particular case. If you do not know what your client wishes, how can you possibly express it? And if you do not, when handling a matter so delicate that one case is distinguishable from another by a difference of expression almost imperceptible, make sure that you are walking in the right path, how can you hope to avoid disaster?

Knowledge
equally
necessary for
solicitor
where counsel
employed.

In dealing with the two principal points which affect legacies to a class, I have, as in my Lectures generally, assumed the case of a solicitor's preparing a will for himself. Perhaps I need hardly say that, where the limitations are intricate and difficult, a solicitor is certainly wise to have recourse to the assistance of counsel. But whether you perform the task of drawing any given will yourself, or whether, having possessed yourself of your client's instructions, you commit the actual draftsmanship to counsel, a general knowledge of the doctrines embraced in the two points which I have brought before you is imperative. It is imperative, whether to enable you to take yourself and to furnish to counsel intelligent and complete instructions, or to apply your own mind to the consideration of a draft will when it comes to you from your counsel's chambers, or to enable you properly to prepare it yourself, or lastly—though this does not fall strictly within my present subject—to enable you intelligently to master the contents of any will that comes before you, and if, in a special case, not necessarily to take upon yourself to construe it, at least to direct your attention to the consideration of what are the material points which arise upon it.

I venture therefore to say that you will not have given me your attention in vain if you gather from this Lecture nothing more than a firmly-rooted appreciation of the fact that, in the case of any bequest, whether of

real or personal estate, to a class of children or issue, it is the paramount duty of the solicitor charged with the preparation of the will to ascertain within what limits the testator desires to confine the class, and at what period the legacy is to vest where its payment is deferred, and having done so, to make it his special care that the testator's wishes are carried out by the use of approved accurate language. I will only add upon this subject, in conclusion, that I would also have you keenly alive to the fact that, while the performance of your duty does not involve any brilliant qualities, but only the good old weapons of patient study and close attention, the slightest neglect of it is more likely to result in a Chancery suit than almost anything in a written document that I know of.

I mentioned a third point which is of considerable practical importance—the application of the income of a legacy where the vesting is deferred to a period subsequent to the testator's death. I will now endeavour to explain how this matter stands.

The third point—application of income when vesting deferred.

It has long been a settled rule of law—independently of statute—that a contingent legacy, that is to say, a legacy the right or title to which does not vest until the happening of a future event, which may or may not take place, as distinguished from a legacy which vests at once, but of which the period of payment is deferred, does not carry any interest in the meantime in favour of the legatee, except in the case of a legacy given by a person *in loco parentis* to the legatee, and even then the exception is subject to another exception, that it does not take effect where the testator has by his own will fixed a sum for maintenance. This principle, already well established, was expressly affirmed, almost in the words which I have used, by the Court of Appeal in the case of *In re George* (L. R., 5 Ch. Div. 837).

The 26th section of Lord Cranworth's Act (23 & 24 Vict. c. 145) declared that where property was held by

How affected formerly by Lord Cranworth's Act.

trustees in trust for an infant, either absolutely, or contingently on his attaining the age of twenty-one years, it should be lawful for the trustees to apply towards his maintenance or education the whole or any part of the income to which he might be *entitled* in respect of such property.

Now at first it might seem as if that section had upset the old law as I have stated it, but if you analyse it a little closely you will find that it did nothing of the sort. It only enabled trustees to apply the income of a contingent legacy for maintenance where the infant might be entitled to such income—in other words, in those cases, and only those cases, in which, under the existing law, the legacy carried interest in the legatee's favour; and it gave no greater power to the Court. This point was expressly so decided in the case of *In re George*, which I just mentioned, and in which a fixed sum for maintenance had been given by the testator.

This section of Lord Cranworth's Act was repealed by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), in favour of the larger enactment of sect. 43 of the latter Act, of which I have in an earlier Lecture stated the substance (c).

And now by
Conveyancing
Act, 1881.

Comparing this section with that in Lord Cranworth's Act, which it replaces, you will find that it is wider in several respects, but for my particular purpose I am only concerned with one of its distinctive features, which is, that there is no limitation as before to income to which an infant may be entitled, and I confess that I should personally have read the section as being, without doubt, large enough to enable trustees in all cases of a contingent legacy, where the testator has not expressed a contrary intention, to apply the income, or part of it, for the benefit of the infant prospective legatee. But in their note upon the section, Messrs. Wolsten-

(c) See *ante*, Lecture V. p. 171.

holme and Turner, in the second edition of their work on the Conveyancing Acts (*d*), make the following observations :—

“ This section replaces sect. 26 of Lord Cranworth’s
 “ Act, and is so worded as to avoid the question raised
 “ in the case of *In re George* on the words in that Act—
 “ ‘ the income to which such infant may be entitled in
 “ ‘ respect of such property.’ In the case of a simple
 “ pecuniary legacy to an infant contingent on his
 “ attaining twenty-one, and carrying interest in the
 “ meantime, the executors being bound to set it apart
 “ and accumulate the income, it is conceived that, in
 “ the absence of any direction to the contrary, the effect
 “ of this section is that, if the infant dies under twenty-
 “ one, the residuary legatee takes only the accumula-
 “ tions representing the unapplied residue of the income.
 “ On the other hand, if no interest is payable on the
 “ legacy till the infant attains twenty-one, there is no
 “ income to which the section can apply, and the
 “ residuary legatee takes the income of the residue
 “ without deduction till the legacy becomes vested.
 “ The short effect of the section seems capable of being
 “ stated thus : Where the income will go along with
 “ the capital, if and when the capital vests, then the
 “ income is applicable under this section for the benefit
 “ of the infant, otherwise not.”

Observations
 of Messrs.
 Wolstenholme
 and Turner on
 latter Act
 considered.

I have puzzled over that note a great many times, and have referred to several other works in the hope of solving my doubts, but I confess that I am fairly unable to reconcile the beginning of it with the end. The writers start by saying that the section is so worded as to get over the question raised in the case of *In re George*, and conclude by observing that where the income goes along with the capital, if and when the capital vests, then, but not otherwise, the income is applicable for the

benefit of the infant. But that last observation strikes me as covering the very identical ground of the decision in *In re George*. There the Court of Appeal said, "We cannot give maintenance out of this income, because, under the rules of equity, the infant is not and will never be entitled to the income." Surely that is exactly tantamount to saying that where the income will go along with the capital if and when the capital vests, then the income is applicable for the infant, but otherwise not.

I am very diffident of expressing an opinion at variance with that of two learned writers (*e*), but I venture to think that the section does in fact clearly operate to brush away the restriction as to the infant's being entitled to the income in order to enable it to be applied for his benefit, and that the true way of summing up the section is to say that wherever a legacy is given to an infant contingently on his attaining the age of twenty-one years, or on the occurrence of some earlier event, then, unless a contrary intention is expressed, the income or part of it may be applied for the maintenance, education, or benefit of the infant.

I am somewhat supported in this view by the fact that Messrs. Clerke and Brett, in their excellent little work on the Conveyancing Acts (*f*), make this observation on the section:—"Under Lord Cranworth's Act it was decided that maintenance might be given out of a fund to which the infant was contingently entitled on attaining twenty-one, but not unless the infant on coming of age would be entitled to both the principal and the intermediate income. It is submitted, however, that this case would be covered by the present section."

(*e*) In the third edition of Messrs. Wolstenholme and Turner's work (published since this Lecture was prepared) the note on which I have commented does not appear. It is possible that the omission may be due to a re-consideration of the views expressed in it.

(*f*) 2nd edit. p. 158.

Whether, however, I am right or wrong in my interpretation of the section, and in thinking that one part of Messrs. Wolstenholme and Turner's note involves a contradiction of the other, I do not feel any doubt as to the practical matters to which the draftsman's attention should be directed, and these I will now place before you.

Practical matters for draftsman's attention.

First, in the case of your client wishing to defer the vesting of a legacy, you would consider whether, in the absence of special provision, the relations of your client to the legatee are or are not such as would make the legacy carry the intermediate income with it. When you have satisfied yourself on this point you would ascertain whether the testator does or does not in fact wish that the legacy shall carry the income, and, if not, whether, at least, he wishes to appropriate any fixed annual sum for the maintenance of the infant legatee. The provisions which give effect to these several intentions are to be found in any standard book of Precedents, and there is no great difficulty in carrying out the testator's wishes on this point when once you are in possession of them. The great matter to guard against is the insertion of provisions without having yourself, and imparting to your client, a clear understanding of their legal import.

One other point I would impress upon you in the same connection. Neither the repealed 26th section of Lord Cranworth's Act nor the 43rd section of the Conveyancing and Law of Property Act, 1881, applies to the case of that artificial extension of the legal period of minority which testators often desire to make—as, for instance, the giving of a legacy to vest at twenty-four or twenty-five years. Whenever, therefore, the vesting is deferred beyond the age of twenty-one years express powers of maintenance must, if it is desired to give such powers, be inserted, as the statute will afford no help to trustees as to any period of minority in excess of that period.

Qualifications in statutory power of maintenance.

I will just add, before leaving this subject of maintenance, that in a very recent case of *In re Thatcher's Trusts* (Weekly Notes, 5th April, 1884, p. 91), Mr. Justice Pearson held that a direction to accumulate the income of the shares of children, and pay the same to them as and when their presumptive shares should become payable under a previous trust, did not constitute the expression of a contrary intention within the meaning of the 43rd section of the Conveyancing and Law of Property Act, 1881. This would seem to show that any expression which would exclude the section must be very distinct and precise, and the case furnishes a warning note to the draftsman.

The next two matters to which I propose to draw your attention depend upon totally different principles of law to, but they have, nevertheless, a somewhat intimate connection with, those which we have just considered, and are also of great practical importance to the draftsman. I refer to the subjects of perpetuities, and of the accumulation of income.

Of these, the first is judge-made law, and the latter depends on the statute 39 & 40 Geo. 3, c. 98, commonly called the Thellusson Act.

The law of
perpetuities.

How the law of perpetuities ever came to be settled without the aid of a statute passes my comprehension. It is as pure a piece of legislation, as distinguished from judicial decision, as can possibly be imagined. But, however it came to pass, it is the law, and we must follow it just as religiously as if it were on the pages of the statute-book.

Its origin.

The rule against perpetuities owed its origin to the policy of favouring the free disposition of property of all kinds. Mr. Joshua Williams, in his book on the Law of Real Property (*g*), observes that the desire of individuals to keep up their name and memory has

often been opposed to this rule of law, and that many shifts and devices have from time to time been tried to keep up a perpetual entail or something that might answer the same end, but, he adds, such contrivances have invariably been defeated.

The battle was not, however, gained without a vast deal of litigation, and the exact limit, in point of time, within which the alienation of property might lawfully be restricted was only settled finally in the year 1833 by a decision of the House of Lords in the leading case of *Cadell v. Palmer* (1 C. & F. 372). It was there held that a limitation which postponed the vesting of property for a period represented by the duration of any number of existing lives and a term of twenty-one years from the death of the survivor was valid, but that a limitation exceeding that period was absolutely void.

Finally
settled by
Cadell v.
Palmer.

There is one curious feature of this rule which I must not omit to mention. The limit, as I have said, is a life or lives plus a period of twenty-one years; but if a testator does not take advantage of the first part of the permission, he is not on that account allowed to add a single hour to the second. A bequest of property to vest in the legatee twenty-one years and one day after the testator's death is void, though there is no life estate interposed before the commencement of the twenty-one years. This was settled by the case of *Palmer v. Halford* (4 Russ. 403).

Incidents of
the law on
this subject.

There is also attaching to the rule against perpetuities another incident which points to the need of the utmost care on the draftsman's part not to exceed the prescribed limit. It is this, that except in one class of cases a limitation which offends against the rule is absolutely void, and does not hold good, so to speak, *pro tanto*. So hard and fast is the line, that even where it is possible or probable that the limitation may, and where in the events which happen it does in fact fall

within the allotted period, it will nevertheless be void if it may in any event be capable of exceeding it. It must, on the face of it, be a limitation which will, of necessity, fall within the limit, or it will fail altogether. Let me show you what I mean by an example. Property is given to the eldest son of A. (who at the time of the testator's decease has no son), and in case such son shall die under twenty-two, then to the second son of A. Here, if A. afterwards has a son, and the son lives to attain twenty-one years, the gift over would clearly fail under the rule. But, of course, A.'s eldest son may die under twenty-one, in which case the limitation to his second son would be ready to take effect within the prescribed period. Nevertheless the limitation would be wholly void because it *might* exceed that period.

Partial exception to the rule—the *cy près* doctrine.

I mentioned that there was one exception to the strict application of this sweeping rule. This occurs where what is called the *cy près* doctrine applies. Out of consideration for that pet idol of the Courts, the ignorant testator, a limitation of land—and remember, please, that this indulgence applies only to real estate—to the unborn son of a living person for life and then to *his* sons in tail will shift the estate tail to the life-tenant (*h*).

Law as to accumulations of income.

With regard to accumulation of income, the Act 39 & 40 Geo. 3, c. 98 was passed in consequence of a great case of *Thellusson v. Woodford* (4 Ves. 227), in which the will of Mr. Thellusson was before the Court. That eccentric person thought fit to direct that the income of his property should be accumulated during the lives of all his children, grand-children, and great grand-children, who were living at the time of his death, for the benefit of some future descendants who should be living at the decease of the survivor. This, as you see, was strictly within the rule against per-

(*h*) Williams' Real Property, 13th edit. pp. 289, 290.

petuities. The Court was obliged to uphold the limitation, and the injustice of the bequest led to the passing of the Act to which I just referred. By this statute the accumulation of income, whether of real or personal estate, is prohibited, in so far as wills are concerned, for a longer period than twenty-one years from the testator's death, or during the minority of any person living at the testator's death, or during the minority of any person who, under the will, would, if of full age, be entitled to the income directed to be accumulated. The Act does not, however, extend to the case of any provision for payment of debts, or for raising portions for children, or to any direction touching the produce of timber.

It is worthy of note that where the direction to accumulate exceeds the statutory limit, it is not altogether void, as in the case of the rule against perpetuities, but only in so far as it exceeds that limit (*i*).

The existence of these strict limits to the lawful tying up of the corpus and income of property casts upon us, as draftsmen, the important practical duty of keeping strictly within legal bounds any desire on the part of a testator to make dispositions stretching into the future, and it is on this account that I have introduced them into this Lecture.

Practical
lesson for
draftsmen.

I now turn to quite another matter—the doctrine of conversion.

In the first place, let me remind you that in its primary and fundamental sense the rule of conversion, whether applied to real or personal estate, is identical—that is to say, a man by his will may so convert real estate into personalty, or personal estate into realty, that from the moment of his death the one species of property will, for all legal purposes, assume the character of, and devolve according to the rules applicable to, the

The doctrine
of conversion.

(*i*) Jarman on Wills, 3rd edit. p. 286.

other, irrespective of the time when the actual literal conversion directed by the testator takes place. That is the principle which lies at the root of conversion, and colours every incident arising out of it.

Illustration.

To take the simplest possible illustration of this—if, by my will, I direct my estate Whiteacre to be sold, and the proceeds to be paid to A., then, in the event of A. dying before the sale takes place, his personal representatives, and not his heir, will be entitled to the proceeds of sale, unless, indeed, A., being absolutely entitled and *sui juris*, has, in his lifetime, elected to take the property in its actual state. Conversely, if I leave 5,000*l.* to be laid out in the purchase of land for the benefit of A., his heir, and not his personal representatives, will be entitled to the legacy if he dies before the land is purchased, unless here again A., being *sui juris*, has elected to take the money as money.

Cases in which advantage taken of the doctrine.

Actual sale may be deferred.

In the case of a large landed proprietor, the aid of the doctrine of conversion is seldom invoked as to his real estate, the desire of the testator usually being to perpetuate the ownership of the land in his family, and, as it is popularly termed, make an eldest son. But there are a great many cases in which the testator's wish is to make one common fund of his real and personal estate, and this object, naturally, can be attained only by means of a sale of the real estate. But then there may, and often does, arise this state of things—that those who are charged by the testator with the duty of turning his land into money may be actually unable to do so at all, or not without ruinous sacrifice, for some time after his death, or, at least, may have excellent reasons, in the interests of the beneficiaries, for postponing the sale to some more or less extended date; and it is very desirable that you should clearly understand how the draftsman should provide for such contingencies in framing the will.

Now I take it that the points to which you have to

direct your attention are twofold. First, there is the need for giving such elasticity to the testator's direction as that the trustees may be able to exercise a reasonable discretion as to the time of sale, without imperilling the operation of the doctrine of conversion with all its attendant incidents. Secondly, there is need to provide for the disposition of the rents and profits during the interval between the testator's death and the actual sale.

With regard to the first point, there is little difficulty in dealing with it. The approved method of draftsmanship is, first, to insert a direction for the conversion of the real estate into money by sale, and to follow this up immediately by providing for the disposition of the sale monies in accordance with the testator's wishes. This will have the effect of bringing into play all the equitable principles attaching to conversion.

Mode of
providing for
this con-
tingency.

Provisions should then be tacked on, giving the trustees a discretion to postpone the conversion either without limit or (but this plan is less frequent) within a limit not to exceed some specified period, and, in the meantime, with or without any special directions, to manage the property, grant leases of it, insure it from fire, and so forth. The extent to which these last powers should be elaborated would, I need hardly say, depend very much upon the nature of the real property of which the testator is, or is likely to become, possessed; but, however large they may be—pray bear this in mind—they will not in the least weaken the legal effect of the earlier trust for sale, if that be clearly and unmistakeably expressed.

The second point is one which, in some cases, calls for very careful consideration, and trustees may be placed in a great difficulty, and perhaps have no alternative but to seek the Court's guidance where this consideration has not been bestowed on the matter at the stage of the preparation of the will. This point arises in the very common case of a testator's giving the income of his

Disposal of
rents pending
sale.

Usual plan.

property for life to one or more persons, and making a disposition of the *corpus* to take effect on the termination of the life interests. In such a case we may take it as a starting-point that all purposes will generally be answered by providing in effect that the rents and profits of the real estate, until the actual sale and the income of any personal estate not literally converted and invested in accordance with the trusts of the will, shall be deemed to be annual income of the trust property, in the same way as if it were the income resulting from an investment of the proceeds of sale, and be applied accordingly.

I apprehend that, even in the absence of such a provision, the Court would adopt that construction of the will, if possible, in preference to the obvious injustice of depriving the life tenant of any beneficial enjoyment until after the actual sale, although this latter result would be consistent with the language of a will which only directs conversion, investment of the proceeds, and payment of the income of the investment to the life tenant, and does not in terms go on to give him the income of the property until sale (*j*).

When not appropriate.

But suppose that the real or leasehold or other property of which the sale is directed is of a wearing-out or wasting character—as, for instance, in the case of land, where the annual profits are derived from the working of minerals, or the rent of a leasehold interest which has only a few years to run. Or, conversely, suppose again that the property is of a more or less reversionary character and produces no present income at all, or no income comparable with that which will be derived from it when some ground lease falls in, or some other event happens, at a date not far distant. In the first of these supposed cases the payment to a life tenant of its annual rent or income until sale would obviously be

(*j*) Hayes & Jarman's Concise Precedents of Wills, 9th edit. pp. 255 *et seq.*

favourable to him ; in the second case it would be as obviously unfavourable. Whenever, therefore, the income of any property does not bear the ordinary ratio of income to capital, it is matter for careful consideration what adjustment shall be made, as between the life tenant and those who are to come after him, of the income of the property before sale. The decision as to this matter must, of course, rest with your client, unless he leaves the widest discretion to you ; but, even where he decides for himself what method he will adopt, you may be quite sure that in nineteen cases out of twenty it is the solicitor, and not the client, who starts the point, and I need hardly, therefore, add that it falls within your province to be alive both to the difficulty and the manner of its solution.

How exceptional cases should be dealt with.

To begin with, the testator may, of course, please himself, and if he chooses to say that, until sale, the life tenant is to have the annual rent and profits, notwithstanding that the latter gains or loses, as the case may be, by so doing, it is of course fully within his competency to give the direction, and you will have nothing to do but insert a clause to that effect by which the trustees will be relieved from responsibility. But if a testator desires that the life tenant shall not receive more or less than the yearly income of the property in the proper sense of that expression, it will be necessary to resort to some device for giving effect to this wish. Perhaps the most effective method of doing so is that indicated in the following well-drawn clause which I have extracted from Hayes & Jarman's Concise Precedents of Wills (*k*), and from which you will gain a good general idea of the plan which it carries out :—

“I declare that in the meantime, until the conversion
 “and investment of my real and personal estates pursuant to the trusts hereinbefore contained, my trustees

Example of clause.

“ shall have full discretionary power to adjust and
 “ determine all rights and equities, as between tenant
 “ for life and reversioner, or otherwise, in regard to
 “ capital and income, upon such principles, and in such
 “ manner, as to my trustees shall seem just and reason-
 “ able, with liberty to apply as income the whole amount
 “ of the actual proceeds and profits of such real and
 “ personal estate, or any part thereof, or to apply as
 “ income part only of such proceeds and profits and
 “ invest the residue thereof as capital, but so that the
 “ income to be received by the tenant for life shall not
 “ be less than the rules of equity allow.”

The general impression produced on the mind by this clause is, I think, that the testator does not wish the life tenant to be placed either at an undue advantage or disadvantage, and will be well satisfied if the rules of equity are adopted by the trustees; but that, as he cannot predicate what will be the exact state of things as to his real estate, he desires to repose the widest discretion in them. So far, this is, I think, wise and right; but the clause is open to one, perhaps unavoidable, objection, that it imposes a very serious responsibility on the trustees, in the exercise of which they may very readily come to loggerheads with the beneficiaries. The office of trustee is at all times so thankless, and the performance of its duties is so strictly measured by the Court, that a cautious man would hesitate long before accepting a trust of this character.

Observations
on the clause.

You will have noticed a reference in the clause, and in the observation which I have just made, to the rules of equity in connection with the matter now under our consideration. It would be beyond my province to enlarge at any length upon those rules, but to make myself quite intelligible I will just add that the equitable rules are opposed to giving to the tenant for life, before sale, more or less than the income which he

would receive after sale. Thus any excess of income produced by unconverted property, beyond that which the property, when converted, would have produced, is considered to be corpus and not income. And, on the other hand, where the conversion into money of a reversionary property is delayed by trustees in the exercise of their discretion, the Court will set a value on the reversion at the end of the first year and give the tenant for life the difference between the fund actually received and the value of the reversion as so ascertained (*l*). You will of course understand, however, that these principles are applicable only where the testator has given no indication of his own wishes.

There are some few other matters applicable alike to real and personal estate, as subjects of testamentary disposition, which are worthy of mention.

By the 27th section of the Wills Act a general devise or bequest of the real or personal estate of a testator passes any real or personal property, as the case may be, over which he has a general power of appointment, and will operate as an execution of the power, unless a contrary intention appears by the will. This provision necessitates care on the part of the draftsman to ascertain before inserting a general devise of real estate, or a general bequest of personalty, whether the testator has a general power of appointment over either class of property, and, if so, what are his wishes as to its disposition. The caution which I would impress upon you in this connection is of a negative kind. By a general disposition, covering property over which the testator has a general power of appointment, his intentions may be frustrated as to that particular property, and you must therefore take care *not* to use language large enough to operate under the section, unless by so doing you will clearly be giving effect to your client's wishes—in other

Wills Act,
sect. 27.

(*l*) Pridaux's Precedents, 12th edit. Vol. II. p. 403; *Wilkinson v. Duncan*, 23 Beav. 469.

words, unless he desires that the property which he has a general power to appoint shall devolve in the same way as the real or personal estate included in his general bequest.

I have already pointed out to you that in the construction of a will the testator's intention is, above all things, regarded, and that each will stands, so to speak, on its own merits, except in so far as previous judicial decisions on exactly similar phraseology impose a rule of construction. I must not, however, omit to add that in one particular, affecting bequests of both real and personal estate, the legislature has made an attempt—unwisely, as some writers think—to furnish us with a rule of construction. The 29th section of the Wills Act declares that in any devise or bequest of real or personal estate the words “die without issue,” or “die “without leaving issue,” or “have no issue,” or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime, or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person, or otherwise. The section concludes with a proviso that the Act shall not extend to cases where the words import, if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age, or otherwise answer the description, required for obtaining a vested estate by a preceding gift to such issue.

Wills Act,
sect. 29 —
statutory rule
of construc-
tion.

Observations
on the section.

If the section which I have just quoted almost *verbatim* is intelligible at first blush to you, I must congratulate you upon possessing an amount of intelligence to which I can lay no claim, for I will honestly confess to you

that I read it over and over again as a student before I was much wiser than when I began. Prior to the Act the expression “dying without issue” and similar expressions had received an interpretation contrary to that which would popularly have been supposed to be their meaning, and the section presumably owed its origin to a desire to correct this variance (*m*). As I understand, if, before the Act, real or personal estate had been given to A. with a gift over in the event of A.’s dying without issue, the gift to A. would, if of real estate, have given him an estate tail—that is to say, the words “dying without issue” would have been construed to mean a failure of issue only in the sense in which a man’s issue fails when an estate tail comes to an end, and the entail might, therefore, have been barred by A. under the Fines and Recoveries Act; and, if the gift were of personal estate, A. would have taken it absolutely, because an estate tail could not be granted in that species of property. Now, since the Act, A. would take the subject of both gifts right out, but subject to their being defeated in the event of his dying without leaving issue living at his death, in which latter case the gift over would take effect as an executory devise (*n*). In other words, Parliament said that when a man in his will uses such an expression as “dying without issue” he must, unless the contrary is shown, be supposed to mean die without actually and in fact leaving issue alive at the time of the legatee’s death, and to attach that as a condition to the gift—and not to intend to merely use the words as words of limitation creating an estate tail which the legatee can, by barring the entail, make his own if it be realty, and which will be his own, if personalty, without any act on his part. That seems reasonably clear, and the wonder rather is,

(*m*) See, as to this, Hayes & Jarman’s Concise Precedents of Wills, 9th edit. p. 57.

(*n*) *Ibid.* p. 94.

I think, how the decisions ever came to put the other interpretation upon these expressions.

Wills Act,
sect. 33.

Again, the 33rd section of the Wills Act provides that where any person, being a child or other issue of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and the issue are living at the time of the testator's death, the devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

This section, as you will see, makes an important exception, in favour of a legatee who is a child or issue of the testator, to the general rule that a legacy lapses by the death of the legatee in the testator's lifetime. Speaking generally, it may be presumed that the operation of the section would be in harmony with a testator's wishes; but when a man is making his will he should at least be made aware of the effect of this or that bequest, and it behoves his solicitor to possess the knowledge requisite for enabling him to point out the legal result which may ensue from this or that provision, and to give his client the opportunity, at all events, of expressing a contrary intention.

Precatory
words.

My next point, which has reference to what are termed precatory words, does not touch the Wills Act. It is a common thing to find in a will—not so common when it is prepared by a professional draftsman, but not very uncommon even then—words of request or recommendation, or hope, on the part of the testator in connection with some bequest. It may be assumed, I think, that the testator's real intention, where such words are used, very rarely is that they shall create a binding trust; but the Court of Chancery, in its love of importing a trust wherever, by hook or by crook, it

can do so, has by a series of decisions drawn the line so tightly round such expressions that it is most dangerous to make use of them unless at all events words are added which expressly negative any intention to create a binding trust (o). I would specially impress this upon you, because nothing is commoner than for a testator, in giving you his instructions, to make use of such expressions in total ignorance of their legal significance.

My remaining point has reference to the date as from which annuities or legacies are payable. When a client instructs you to insert in his will a direction for payment of an annuity of 50*l.* to A. B. for life, or a direction to set apart and invest a trust fund, and pay the income to A. B. for life, he will be tolerably certain to labour under the impression that he is providing for the annuitant or legatee as from the moment of his (the testator's) death. Now, in the case of the annuity, this is substantially the result, because the annuity does commence from the date of the testator's death in the absence of direction to the contrary. But the first payment is not due till the expiration of one year from the death, and you will readily see that in many cases the annuitant may be put to sore straits, never intended by the testator, during the twelve months. This may be met by a direction that the annuity shall commence from the testator's decease, and be payable quarterly, or at whatever other stated intervals the testator desires, in which case the executor must make the payments in accordance with the terms of the will, subject only to his being first satisfied of the sufficiency of the estate to answer debts and legacies.

As to period
for payment
of legacies
and annuities.

With regard to trust legacies the case is different, and, in the absence of special direction in the will, the legacy cannot, as against the residuary legatee, be

(o) A collection of instances in which precatory words have and have not been held to create a trust will be found in *Prideaux's Precedents*, 12th edit. Vol. II. pp. 406, 407.

appropriated until a year after the death, and the right to the income will not begin to accrue till then. This result is, of course, still more disastrous to the legatee, in whose favour, perhaps, the testator is intending by his will to keep on foot some provision which he has made during his life, and which represents the legatee's sole means of subsistence. Whenever, therefore, you have any reason to suppose that the testator contemplates making a provision to take effect immediately on his death, you should clear up all doubt on the subject, and if your surmise is correct, you should provide specially in the will that the legacy is to take immediate effect, and that if (as will in all probability be the case) it cannot be at once invested and set apart, the legatee shall receive in the interval, out of the general estate, a sum equal to the income to be enjoyed from the trust legacy when it shall be invested.

I may just mention that an instance came to my knowledge not long since in which two separate trust legacies were left by a will in circumstances such as I have described, and in each case the legatee was entirely dependent on the bequest, but the will contained no power enabling the executors to anticipate the expiration of a year from the death. But for the generosity of the residuary legatee, who refused to assert any claim, the legatees would have been reduced to extremities during the twelve months in which they would have received no income.

As to legacy
duty on
annuities and
life interests.

There is one other matter which I may just mention in connection with annuities and life interests. Most testators have a general idea as to the legacy duty, but few laymen know how this tax operates on a life provision. Taking the common case of an annuity, what happens is this:—The value of an annuity of the given amount on a life of the age of the annuitant is calculated by the Government tables, and on the lump sum arrived at legacy duty at so much per cent. is payable

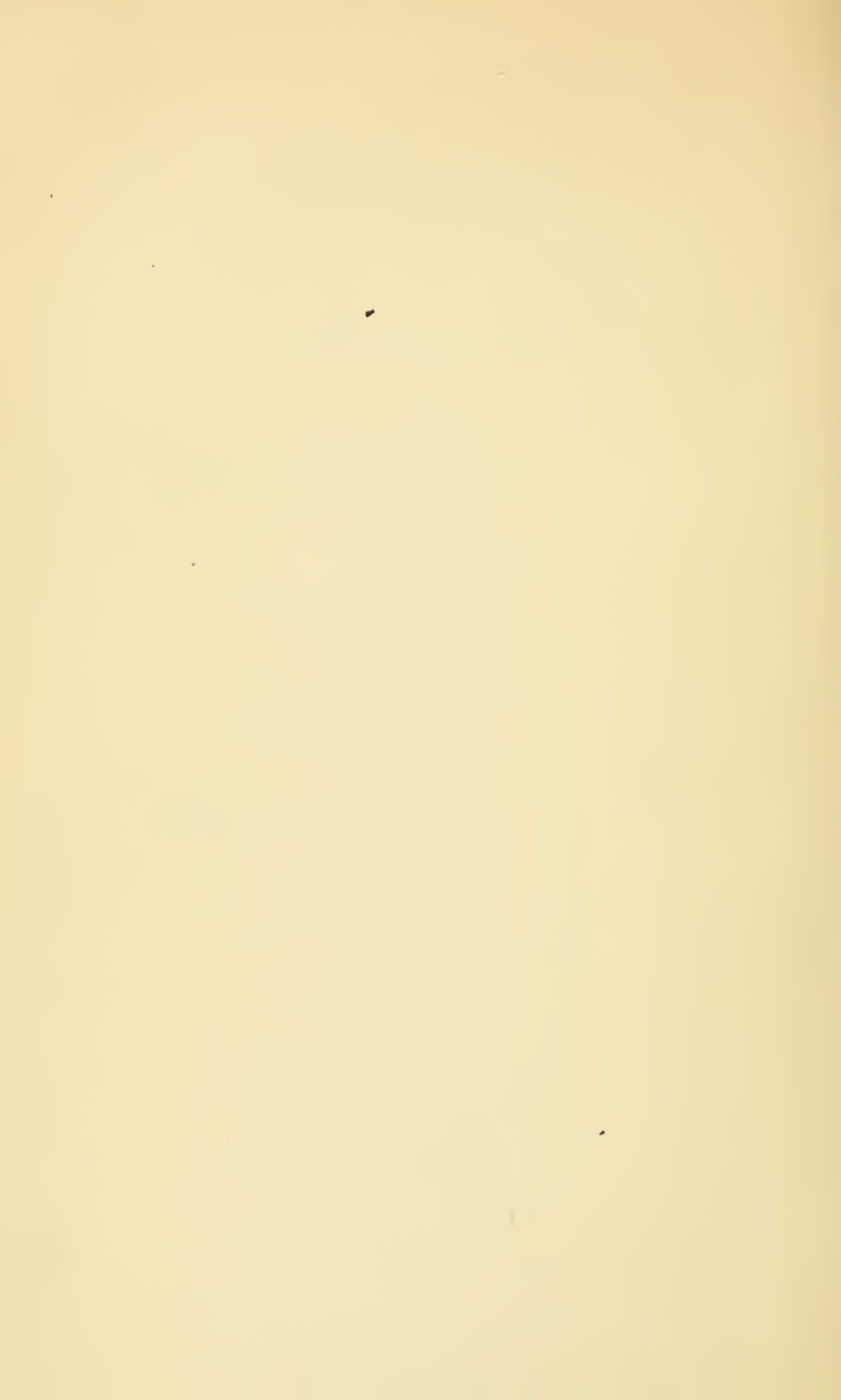
by four annual payments. In the case of a stranger in blood, or a distant relative, this is a very serious deduction indeed from the income receivable for four years after the testator's death, and it may well be that if made aware of it he will desire to cast the duty on to his general estate rather than to impose the burden on the annuitant. Here, again, it happens that I can recall a case in point—that of a lady who had received a yearly income of a certain amount from a wealthy testatrix, and was entirely dependent on it. By her will the testatrix left her an annuity of the same amount, but did not give it free of duty. The consequence was, that for four years an income on which the annuitant had barely been able to make both ends meet was reduced by one-third. From the facts of which I became aware I have every possible reason to think that such a result would have been the last that the testatrix would have desired.

The point is obviously one which may very properly be brought to the attention of a testator, and it is by bearing such matters as these in mind that a solicitor effectively fulfils his duties and deservedly gains the confidence of his clients.

NINTH LECTURE.



WILLS <i>(continued)</i> .	{	MATTERS SPECIALLY CONNECTED WITH BEQUESTS OF REAL ESTATE:—
		THE <i>LEX LOCI</i> .
		THE MORTMAIN ACTS.
		THE WILLS ACT.
		CHARGES FOR PAYMENT OF DEBTS AND LEGACIES.
		MATTERS SPECIALLY CONNECTED WITH BEQUESTS OF PERSONAL ESTATE:—
		THE TESTATOR'S DOMICILE.
		EXECUTORS.
		LEGACIES.
		SATISFACTION.



NINTH LECTURE.



OUR attention was devoted in my Eighth Lecture to points bearing on the draftsmanship of wills which, for the most part, affected indiscriminately both real and personal estate. I now propose to deal with some of the distinctive features incident to the testamentary disposition of each of those classes of property.

Subject of
Lecture.

And, first, as to real estate.

It is a fundamental principle of law, to be borne in mind by every draftsman of a will, that the law of immoveable or real property is that of the country in which it is situate, and, as a consequence, that a will disposing of real estate must be drawn in the mode, and executed with the formalities, required by the law of that country. Formerly the application of this rule would have prevented a will made according to English law from passing real estate situate even in Scotland, as that part of the United Kingdom was expressly excepted from the Wills Act (*a*), but, by the joint operation of no less than three statutes (*b*), land in Scotland may now be devised by a will made in England according to English form, and, unless expressly excepted, will pass by a general devise in an English will. In many of our colonies also, the Wills Act, either bodily or with some variations, has been adopted by the colonial legislatures. But as to land situate elsewhere

First rule of
law as to wills
of realty—the
lex loci.

Land in
Scotland.

Land else-
where.

(*a*) By sect. 35.

(*b*) 24 & 25 Vict. c. 114; 31 & 32 Vict. c. 101, s. 20; and 37 & 38 Vict. c. 94, ss. 46, 51.

than in Great Britain and Ireland the formalities of the particular country, whether it be a foreign country or whether it be an English colony, must be observed in order to make the devise valid; and as to those colonies which have adopted a mode of testamentary disposition similar to our own, it has in each case been the result of a voluntary act of the local legislature, and has no sort of reference to the English Wills Act as such. From this principle of law the important practical lesson may be deduced that no English lawyer should attempt to include in a will a devise of real property situate abroad until and unless he is satisfied that a valid gift of it may be made by a will prepared in accordance with the law of England.

The Mort-
main Acts.

The next point to which I would direct your attention in connection with testamentary dispositions of real estate is that of the legal restrictions imposed on gifts of land for charitable purposes. These restrictions originated with, and are still mainly dependent on, the Act of 9 Geo. 2, c. 36, commonly called the Mortmain Act. The preamble gives the key to the object which the statute aimed at—viz., the prevention of improvident alienations or dispositions of landed estates by languishing or dying persons to the disherison of their lawful heirs. Whether, however, that object has not been attained in some few cases at the cost of a great deal of trouble and injustice in many more may well be gravely doubted. The original statute has been modified from time to time in the general sense of relaxing some of its more stringent requirements, and in the particular sense of making favoured exceptions in such cases as sites for church building, for schools, for literary and scientific institutions, for playgrounds for children, and grounds for the recreation of adults (*c*); but, in the main, testators are still disabled from giving by will for charitable pur-

(*c*) See Williams' Real Property, 13th edit. pp. 70—79.

poses any interest in real estate or money to be laid out therein.

A great number of cases have been decided on the Mortmain Act, and the judges have often been puzzled in determining its application to particular circumstances. The cases which have presented difficulty from time to time have, as you would naturally suppose, been those in which either the gift itself has been of some species of ownership of a more or less hybrid character, as to which it has not been easy to say whether it was an interest in real estate or not, or it has been open to argument whether the object, as expressed in the testator's will, has brought it within the Act. In so far as it is possible to collect any general idea from a large number of not always harmonious authorities, I am disposed to think that, on the whole, the former of these classes of case, in which the nature of the property itself has been under discussion, has received a strict rule of interpretation in a sense adverse to the validity of the testamentary disposition, and that with regard to the latter class—in which the question has turned on the object which the testator has had in view—the construction has been somewhat more favourable to the will (*d*). But it is not my purpose to lecture to you on refinements of decided cases, and the moral to be drawn is plain enough—that where there is any possibility of a question as to validity, you should throw the testator's charitable gifts entirely on to his purely personal estate, and should be careful in all cases to steer clear of the Acts. The need for special caution in this respect arises principally where a testator is possessed of what is called impure personalty, or personalty savouring of the realty—that is to say, property which just falls

Judicial construction of those Acts.

Practical lesson from Mortmain Acts.

(*d*) See a number of cases collected in Hayes & Jarman's Concise Precedents of Wills, 9th edit. p. 328 *et seq.*

within the grasp of the Mortmain Acts. In such a case, if upon the construction of the will the source for payment of charitable legacies would be a common fund of pure and impure personalty, those legacies will be void to the extent of the proportion which but for the Act would be payable out of the latter. This difficulty may be met by a direction that the testator's charitable legacies shall be paid exclusively out of such part of his personal estate as may be lawfully appropriated to such purposes, and it is wise to add the words "and in preference to any other payment thereout," as otherwise, if the pure personalty does not suffice to meet its rateable share of the debts of the testator, and his funeral and testamentary expenses, as well as the whole of the charitable legacies, there will be a danger that those legacies may abate to the extent of the deficiency.

Mode of
evading the
Mortmain
Acts.

In Mr. Elphinstone's Introduction to Conveyancing (3rd edit. p. 407) he mentions the following curious device as being often adopted when it is desired to make gifts of real estate, which would be void under the Mortmain Acts, for the purposes of the religion of one of the principal denominations in this country:—

"The testator devises or bequeaths the property to two or three of the clergy of that denomination, selecting respectable people whom he does not know personally, and he carefully abstains from communicating his intentions to them; he leaves with his will a letter addressed to them, stating what he wishes to have done with the gift, and also a letter addressed to their ecclesiastical superior informing him of the circumstance; so that it is impossible, on the one hand, for them to suppress the testator's wishes and retain the gift for their own use without their conduct becoming known to the superior, and, on the other hand, for anyone to establish that a trust is created which might be invalid as offending against the law."

It is a curious commentary upon the doubtful wisdom

and justice of the Mortmain Acts that the heads of a religious denomination should lend their approval to a device which is neither more nor less than a pure evasion of the law of this country.

To turn to another point. It is important for the draftsman of a will which deals with real estate to bear in mind how wide an effect is given under the Wills Act to testamentary language as applied to that class of property. The Wills Act.

There was a curious distinction before the Act between real and personal estate, for whereas a devise of the former, however general in terms, included only such real estate as the testator was possessed of at the date of his will, a general bequest of personal estate included even then all personalty belonging to the testator at the time of his death (*c*). The distinction, however, no longer exists, and in the case of real estate, equally as in the case of personal estate, the will speaks from the date of the death unless a contrary intention is expressed. Will speaks from date of death.

Then again, the 26th section of the Act effected another important alteration in the law. Before the Act a general devise of all a testator's land did not pass leasehold estate except where he had no other land, or where the intention to dispose of leasehold property was manifested in the will; but, under that section, leasehold property will now pass under a general devise unless a contrary intention appears by the will—thereby exactly reversing the old law. Wills Act, sect. 26.

The section also extends to copyhold estates, and it is useful to bear in mind that they pass under a general devise; but I may mention that, as a question of alteration in the law, the introduction of copyholds into the section was apparently unnecessary, as before the Wills

(*c*) Pridgeaux's Precedents, 12th edit. Vol. II. p. 357.

Act copyholds were held to pass under a general devise (*f*).

Wills Act,
sect. 28.

And once more, whereas a devise of real estate to A. B. without any words of limitation would, before the Act, have passed only a life estate (*g*), such a devise will now, under the 28th section, pass the whole of the testator's interest, whether it be the fee simple or any lesser interest, unless a contrary intention appears by the will.

Observations
on these
sections.

Now, with regard to these provisions of the Act, the first—that which postpones the date as of which a will of realty speaks to the date of death—may be traced, I think, to considerations of general policy and advantage; while the other changes in the law which I have just mentioned are obviously referable to the desire of the legislature, in the case of wills, to bring, as far as possible, a popular mode of expression into harmony with the legal construction of the document. The reason for this, no doubt, is to be found in the fact that many laymen make their wills without professional aid, and it was deemed desirable to lessen as much as possible the mischief which almost invariably followed, and still follows, and always will follow, from that proceeding. A layman who, before the Wills Act, wrote down in his will, "I give my estate, Blackacre, to my son John," could certainly not have been reasonably suspected of knowing that under that bequest the unfortunate John would only have got a life estate, and might have argued with some force, had he been heard on the construction of his own will, that the expression was clear enough to the ordinary intelligence whatever lawyers might say about it.

It follows from what I have said that in the main these provisions are more pertinent to laymen than

(*f*) *Doe v. Ludlow*, 7 Bing. 275.

(*g*) Williams' Real Property, 13th edit. p. 19.

lawyers, and certainly you may take it that, notwithstanding the Act, no prudent lawyer who prepares a will would dream of relying upon its provisions by omitting express mention either of leaseholds or copyholds or of words of limitation where a fee simple estate is devised—for this reason, if for no other, that, if he does so, there may be some other expression in the will upon which at least a colourable argument may be raised that leaseholds or copyholds were not intended to pass, or, as the case may be, that only a life estate was, in fact, intended to be given; in short, to use the language of the Act, that the contrary appears by the will.

Nevertheless, I counsel you to bear these enactments carefully in mind, and make them as familiar to yourselves as household words, for reasons which will, I hope, be convincing to you. To take the first of them. A client instructs you to prepare his will, and he writes or says to you that he wishes to leave his landed property to so-and-so. Just see what a blunder you may make if you rush to a conclusion as to what he means, and fail to bear the Wills Act in mind. Your client may be thinking only of the particular landed property which he owns at the time he makes his will, in which case, of course, a devise in general terms will by no means give effect to his wishes, and the real estate which is the subject of the bequest should be specified in the will. On the other hand, he may mean, of course, to include in the devise all real estate of which he may die possessed, in which case the devise will rightly be in general terms. A knowledge of the statute will at once lead you to put your finger on this part of your client's instructions, and to clear the point up before you put pen to paper; ignorance of it might well lead you to overlook the matter and perhaps insert a provision altogether at variance with the testator's

real wishes, while all the time he, as a layman—and this is the real point—might be quite unaware that the will as framed would not give effect to his intentions.

Upon the section as to leaseholds and copyholds there arises this consideration for the draftsman—that before inserting a general devise of real estate he should ascertain of the testator whether he has any leasehold or copyhold property, and, if so, what are his wishes as to its disposition. If it is desired that it shall pass in the same way as the real estate generally devised it should be included in that devise, not by minute description, but by general terms sufficiently showing that it is expressly included in the devise. If it is not intended so to dispose of it, then care should be taken that it does not, by virtue of the Act, pass by the general words of devise.

As to the gift of a fee simple without words of limitation, there is not much to be said about the provision beyond this, that it is for the practitioner rather in the nature of a warning from a negative point of view. A will is sometimes prepared, as we have seen, in circumstances of urgent haste, and when brevity of expression is of the utmost moment. But however urgent the case may be, and however scant may be your opportunities for reflection, you will be on your guard not to insert a clause giving real estate to A. B. simply, where there is any possibility of the gift being construed as intended to pass only a life interest by reason of the context.

There are some few other provisions of the Wills Act not touching my subject sufficiently closely from the point of view in which I wish to present it to you for me to dwell upon them at any length, but which I do not like to pass over in silence.

The 25th section declares, in substance, that, unless a

* Wills Act,
sect. 25.

contrary intention appears, any real estate the devise of which has lapsed by the death of the devisee, or is void, shall fall into the residuary devise, if there be one contained in the will. That is intelligible enough.

The 30th and 31st sections relate to devises of real estate to trustees. I should embark on a very long and tedious discourse if I were to attempt to deal exhaustively with these sections. They have been adversely criticised, and, I think, justly so. Some writers have endeavoured to show what each section means, and how the one may be distinguished from the other, but when so eminent a judge as Sir George Jessel has placed on record (*h*) his belief that the real history of the two sections is that they are two drafts of the same subject, though both remain in the statute book, I may well be excused for not attempting the task of dissection. I may, however, observe this, that however difficult a problem confused enactments or conflicting decisions may present where you have to place a meaning upon a doubtful instrument, they may at least serve the purpose of a danger signal to the draftsman. In the case of these provisions the lesson to learn from the difficulties which surround their interpretation is clearly, I think, this—that whenever it is intended to devise real estate to a trustee or executor the precise extent or limit of the estate with which he is to be clothed should be clearly expressed.

Wills Act,
sects. 30, 31.

The 32nd section makes a partial exception in favour of estates tail to the general rule that a devise lapses by the death of the devisee in the testator's lifetime.

Wills Act,
sect. 32.

All these provisions of the Act are worthy of your careful study, and I earnestly advise you to master them. Whether it be to assist you to clear up a doubtful point in your instructions, or to enable you to see that a testator may be setting out a scheme of disposi-

Importance of
studying the
Wills Act.

(*h*) In *Freme v. Clement*, L. R., 18 Ch. Div. 499; 50 L. J. R., Ch. Div. 808.

tion in which there is either some actual flaw or else some risk that by operation of law his wishes may in certain events, which you would point out to him, be liable to be defeated, or whether it be to put you in possession of the requisite technical knowledge of your subject, without which you can never become competent draftsmen, depend upon it that the study of the Wills Act will repay you for all the trouble you bestow on it. To affect to prepare wills without first mastering that statute is like trying to paint a picture blindfolded. Some of its provisions have been severely handled by learned writers, but with some few slight modifications it has stood its ground for nearly half a century as practically our only statutory exposition of the law of wills, and seems to bid fair to stand for fifty years more; and although legal criticism may be a very useful and intellectual pursuit in its way, and very improving to the mind, your first duty and mine is to learn the law as it is, and we shall be wise to reserve, until after we have done that, any expression of our views as to what it ought to be.

Charge of
debts or
legacies.

There is one other subject connected with devises of real estate—a testamentary charge of debts or legacies on real estate—on which I have hesitated to touch for much the same reason that has induced me to refer so briefly to the 30th and 31st sections of the Wills Act—I mean the great difficulty and complication of the subject. When I say that, I do not mean that I have had any unwillingness to explain it to the best of my power, but that I have been afraid of my inability to do so thoroughly without occupying what would, relatively to other matters of practical importance, be an undue proportion of my allotted space.

Nevertheless I am impressed so strongly with a consciousness that this part of my subject would be incomplete without mention of the very important matter to

which I refer, that I cannot bring myself to conclude my observations on testamentary dispositions of real estate without some allusion to it.

You are well aware that a man's personal estate is the primary fund for payment of his debts, and that, in the absence of special provision to the contrary, his real estate can only be resorted to where the personal estate is insufficient to meet the debts.

General rule as to source for payment of debts.

Now it is quite competent for a testator to make of his real and personal estate a common source for payment of debts or legacies, or both, or, if he so pleases, to exonerate his personal estate, as between his personal representatives and his devisee or heir, by charging debts or legacies, or both, entirely on the real estate; but if he does do this—if he does attach to his real estate any obligation which would otherwise fall primarily on his personal estate—it is obvious that some person should be clothed by his will with the legal power to deal with the real estate, whether by way of sale or mortgage, so as to give effect to the testator's intention.

May be varied.

One would have supposed that this necessity would have been tolerably evident, especially when coupled with knowledge of the elementary legal principle that an executor, as such, has no concern or power to deal with a testator's real estate at all; that the legal title to that class of property descends to whomsoever it may be devised without any reference to the executor, and, in case of intestacy, passes to the testator's heir-at-law.

Nevertheless, ignorant testators, incompetent draftsmen, and the Court of Chancery between them have succeeded in raising a dense cloud of conflicting authorities round this subject, and especially in connection with the payment of debts. The mischief has originated principally from the frequent use in wills of such an expression as "I direct my debts, funeral and

Authorities conflicting on this subject.

“testamentary expenses to be paid,” without saying how or by whom. Upon such an expression as this, without any context to explain it, the Court of Chancery seized, and held it to operate as a charge of debts on the testator’s real estate. And you will readily understand that when this meaning was once attached to a direction in those terms, attempts were made, and often successfully, to fasten a similar construction upon numberless other ambiguous expressions. But the determination of the question whether or not a testator had in fact charged his real estate with his debts by no means exhausted the difficulty. Granted that there *was* a charge, who was the right person to give effect to it? Who could make a title to a purchaser or mortgagee? Was it the executor, or the devisee, or the heir-at-law? Upon this point also the Court’s decision was invoked in numerous cases, and here again the decisions were often most difficult to reconcile, and the opinions of eminent lawyers differed as widely as the poles.

True state of
the law.

The true position in which the law stood is perhaps accurately expressed (subject to a qualification which I will presently mention) in White & Tudor’s Leading Cases in Equity (*i*) in the following passage, which follows a review of a number of cases:—

“The conclusion which may be drawn from these cases seems to be this, that where there is a general charge of debts upon real estate the executors have in equity an implied power to sell it, and they alone can give a valid receipt for the purchase-money; but, as they do not take by implication a legal power to sell, and cannot, therefore, convey the legal estate, the persons in whom it is vested (if it be not already in the executors, by devise or otherwise) must concur with them in the conveyance.”

The qualification to which I referred is this—that the passage which I have quoted appears in an edition published subsequently to Lord St. Leonards' Act (22 & 23 Vict. c. 35), to which Act the notes upon the same case subsequently refer, with the observation (*j*) that the law upon this subject has been partially altered by the statute.

The sections of that Act which affect the matter are sections 14 to 17, the provisions of which are so important that I will state their substance as concisely as I can. 22 & 23 Vict.
c. 35, ss. 14—
17.

The 14th section enacts that, where by any will coming into operation after the passing of the Act the testator shall have charged his real estate or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate, so charged, to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debts, legacy, or sum of money out of such estate, it shall be lawful for the devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money by sale by public auction or private contract, or by mortgage of the hereditaments, or partly in one mode and partly in the other; and that any such mortgage may reserve such interest, and fix such times of repayment, as the parties executing it shall think proper. Sect. 14.

The 15th section extends the powers of the 14th section to everyone in whom the estate devised shall by any means be vested, or to anyone appointed either under any power in the will, or by the Court, to succeed to the trusteeship so vested. Sect. 15.

The 16th section declares that if any testator who Sect. 16.

shall have created such a charge as is described in sect. 14 shall have so devised the hereditaments charged as not to vest all his estate therein in any trustee, his executor named in the will (if any) shall have the same power of raising the monies as before vested in his devisees in trust; and that such power shall devolve on the person in whom the executorship is vested for the time being; but that any sale or mortgage under the Act shall operate only on the estate or interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

Sect. 17.

The 17th section exonerates purchasers and mortgagees from inquiring whether the powers conferred by sects. 14, 15 and 16 have been duly exercised by the persons acting in virtue of them.

Observations
of Messrs.
Hayes and
Jarman on
these sections.

Of these sections it is said by Messrs. Hayes and Jarman (*k*) that the difficulty—that is, the difficulty occasioned by the conflicting state of the authorities—has been removed in two cases, first, by giving a devisee of the fee, who is a trustee for totally foreign purposes, a power to sell or mortgage for the satisfaction of the charge of debts, and, secondly, by giving the executor power to sell or mortgage when the estate is cut up by successive limitations, without the intervention of a trustee of the legal fee; but that in the cases where the testator died before the 13th August, 1859, or where there is a devise subject to the charge of debts to a beneficial owner in fee or in tail, or for all other the testator's interest in the estate, the Act leaves this question in the same doubt and perplexity as before.

Practical
lesson for
draftsman.

Of this matter it may be said equally as of the 30th and 31st sections of the Wills Act, which we have considered, and to which I have already applied the remark, that the practical lesson for the draftsman is very much

(*k*) Hayes & Jarman's Concise Precedents of Wills, 9th edit. p. 575.

easier to learn than that which presents itself to the lawyer who has to construe an instrument. The mind of the latter may well be tossed about when he has to apply complicated principles dependent upon a mass of more or less conflicting decisions; but for the draftsman who sits down to prepare a will to-day, the word "cave" expresses almost all that has to be borne in mind on this point.

In Mr. Charles Davidson's *Precedents* (1), the moral which I wish to impress upon you is forcibly expressed in these terms:—

"The testator is sometimes made to direct in general terms the payment of his funeral and testamentary expenses and debts, but this is incorrect. If he mean nothing more than that they should be paid out of his personal estate, there is no occasion to direct this to be done, because it must be done by law whether he will it or not; if, on the other hand, he desires to charge his funeral and testamentary expenses and debts on some particular fund, or on his real estate, he should do so expressly and provide the requisite machinery for effecting the intention."

I now reach the third division of my subject—to wit, the consideration of special features which attach to bequests of personal estate only.

It is difficult to institute a comparison between two things of widely different nature; but I think it may be truly said, on the one hand, that the characteristics of testamentary dispositions of personal estate embrace a much wider area in number and diversity than those which pertain to real estate; and, on the other hand, that they are for the most part capable of much easier and shorter explanation.

The reason for the first of these propositions is not far to seek. In the first place only a comparatively

Bequests of
personal
estate.

Their
character-
istics as com-
pared with
devises of
realty.

small number of testators possess any real estate at all, whereas every testator has personal property of some kind, if it be only the coat on his back. And then again, real estate—is real estate. It must have something to do with land; whereas personal estate embraces all manner of various subjects. Hence bequests of personalty necessarily admit of differences of expression and intention in a much greater degree than gifts of realty.

As to my second proposition the true reason for it is, I take it, that personal estate is unfettered by any of the historical incidents in which the law of real estate is so largely bound up. As Mr. Goodeve truly says in the preface to his work on the Modern Law of Real Property, the reasons upon which so much of the English law of real property is founded being historical, and much of the present law still depending on the enactments of former centuries, a knowledge of the past is largely necessary to an understanding of the present.

Law of
personal es-
tate follows
the domicile.

In speaking of wills of real estate I impressed upon you at the outset that the law of immoveable or real estate is that of the country in which it is situate. Speaking of personalty I would now with equal force remind you, as being a fact of the first importance to the draftsman, that the law of moveables or personal estate—I prefer the latter expression, because a sum in consols or a share in a company is not very appropriately embraced in the expression moveables—follows the law of the testator's domicile (*m*).

Cases in
which no
question of
domicil
arises.

If a client who instructs you to prepare his will has, in the words of a certain popular ditty, “disdained all temptations to belong to other nations,” and is an unmistakeable Englishman, if his personal estate is all here, and if he has, moreover, made his permanent abiding home in this country, and has never deserted it

(*m*) Hayes & Jarman's Concise Precedents of Wills, 9th edit. p. 549.

for any longer period than is involved in making a temporary expedition abroad for some purpose of business or pleasure, no question of domicile will arise to complicate your task; you will, in the preparation of his will, simply pay regard to the law of this country. But if he was not born or bred here, or has no abiding home here, or it is doubtful whether he would legally be considered to have one or not, or if from the nature of his business or habits of life he is more or less cosmopolitan, and it is difficult to say which of two or more countries can claim him as its citizen, then it will be necessary for you to direct your attention carefully to the consideration of the question of domicile; and I must add for your comfort, that this is a matter which, in many cases, presents features of considerable difficulty.

Cases in which it does arise.

It would be quite foreign to my purpose to attempt an exhaustive disquisition upon the law of domicile, and those of you who have the time and opportunity to study it closely will gain much more benefit from a perusal of Mr. Dicey's masterly treatise on the subject than you would from following any observations of mine. But the law of domicile has so important and direct a bearing upon the draftsmanship of wills of personality that I have decided to endeavour to explain to you the broad principles which constitute, as it were, the syntax of the subject in its special relation to wills.

The law of domicile.

It is necessary, first, to understand what domicile is. One would suppose that there would be no great difficulty in giving an accurate definition of a term round which so many important legal principles gravitate. But so far is this from being the case that many eminent writers have given definitions which are open, more or less, to objection; and Mr. Dicey, in his book, devotes a note of many pages (*n*) to the vindication of his own definition, and a criticism of definitions

Definitions of domicile.

(*n*) See Dicey's Law of Domicil, p. 331 *et seq.*

by other writers; while in another part of his work he makes the observation that no definition of domicile has given entire satisfaction to English judges (*o*). If I may venture even to form any opinion on a subject about which learned lawyers have differed, in expression at least if not in substance, I would say that Mr. Dicey's own definition appears to me to be the most accurate, and to convey, to my mind at least, the most intelligible meaning. It is this:—

“The domicile of any person is, in general, the place
“or country which is, in fact, his permanent home, but
“is in some cases the place or country which, whether it
“be, in fact, his home or not, is determined to be his
“home by a rule of law.”

Not necessarily synonymous with residence.

To understand this definition it is necessary to grasp at starting the fact, which underlies the whole subject, and a failure to comprehend which has often given rise to great confusion—that domicile is not necessarily synonymous with *residence*, although it is the legal signification of a man's home. If I take a house in London for a term of years, furnish it, and live in it with my family, I unquestionably make England my home for the time being in the ordinary popular sense of the expression; but it does not follow of necessity by any means that by so living in it I become in the eye of the law a domiciled Englishman, although it may furnish strong evidence to lead to that conclusion.

Modes of acquiring it.

It will still further assist you to comprehend the definition if I now mention three modes recognised in law of acquiring domicile:—

(1) There is domicile of birth or origin. This, as is pointed out by Messrs. Hayes and Jarman (*p*), is involuntary the creation of law, not of the person, and the law from which it arises is this, that to every child, as soon

(*o*) Dicey's Law of Domicil, p. 42.

(*p*) Concise Precedents of Wills, 9th edit. p. 549.

as he is born, is attributed the domicile of his father if he is legitimate, and of his mother if he is illegitimate.

(2) There is domicile of choice, of which Mr. Dicey (*q*) says that every independent person can acquire it by the combination of residence and intention of permanent and indefinite residence, but not otherwise. This domicile is, as you will see, acquired by the act of the party, and if it be not the same domicile as that of his birth it follows that he has effected a voluntary change of domicile if his acts fall within the rule. Whether they have done so or not is a sort of mixed question of fact and law, but more of fact than of law (*r*).

(3) There is domicile by operation of law, which applies to those persons whose domicile is dependent on that of other persons, and changes, if at all, with the domicile of those on whom they are legally dependent. This class embraces married women and infants. Messrs. Hayes and Jarman (*s*) include under this same heading, as a separate class, persons on whom, as they put it, the State fixes a domicile, and illustrate this class by such examples as students, domestic servants, military and naval officers, ambassadors, and consuls; but Mr. Dicey (*t*), more accurately as I venture to think, treats of these special cases not as a separate class, but merely as instances in which the evidence afforded by the test of residence may be inconsistent with, or may rebut the presumption of, the existence of an intention to reside permanently.

Having now pointed out, though, of course, only in the largest and most general way, what I may term the ingredients of domicile, I will try to show you its

Practical application of domicile to will of personalty.

(*q*) Dicey's Law of Domicil, p. 5.

(*r*) Hayes and Jarman's Concise Precedents of Wills, 9th edit. p. 554.

(*s*) 9th edit. pp. 550—553.

(*t*) Dicey's Law of Domicil, p. 125.

practical application to a will of personalty, in so far as broad general rules will enable me to do so.

Distinction
between
validity and
interpretation
of contents.

In approaching this subject it is important to bear in mind that there is a material distinction between the validity of a will and the interpretation of its contents, and that there is nothing in common between them, except in the case in which the invalidity arises from the circumstance that the internal provisions of the instrument are contrary to the law of the testator's domicile. By validity I mean validity in the sense of testamentary capacity, compliance with the formalities required by law, and provisions not contrary to law (*u*).

Dealing first with the question of validity, it is obvious that the draftsman of a will can only guide his steps by the state of things existing at the time when the will is made, and I have, therefore, looked into the subject from that special point of view. You must not hold Mr. Dicey responsible for my method of treatment or language, but I think I may say that in substance the following rules would be in harmony with his views as to the law.

Rules of law
bearing on
this subject.

(1) Any will of personalty, which is valid according to the law of the testator's domicile at the time of his making it, is valid, and the validity will not be affected by reason of a subsequent change of the testator's domicile, except possibly in this one remote case, that a will which is invalid on account of its provisions being contrary to the law of the testator's domicile at the time of his death, might perhaps be held to be invalid, although it would have been valid according to the law of his domicile at the time of its execution (*v*).

(2) Conversely, subject to the important exceptions which I will presently mention, any will of personalty, which is invalid according to the law of the testator's domicile at the time of his making it, is invalid.

(*u*) Dicey's Law of Domicil, p. 26.

(*v*) *Ibid.* pp. 27, 312.

Whether such a will can become valid by a subsequent change of the testator's domicile depends on considerations too far removed from my practical purpose, and too much surrounded by doubts as yet unsolved by judicial decision for me to enter into them here, but you will find this matter exhaustively treated of in pp. 310—313 of Mr. Dicey's book.

Of the exceptions to which I referred, one, at least, is of great moment to the draftsman of a will.

It is, that every will made within the United Kingdom by a British subject shall, as regards personal estate, be held to be well executed, and be admitted to probate in England, and in Ireland and Scotland to confirmation, if executed according to the forms required by the laws for the time being in force in that part of the United Kingdom in which it is made.

The authority for this exception is the Statute 24 & 25 Vict. c. 114, and it relieves us, as you see, from all trouble in the case of any question as to whether a testator's domicile is English, Welsh, Irish, or Scotch; and I may mention that, before the Act, questions of Scotch domicile were frequently brought before the Court for determination.

The other exception, which has reference to wills made out of the United Kingdom, arises under the same statute, and as it has no direct bearing on my subject, I will only refer you for it to the Act.

So far as to the actual validity of wills of personal estate. But assuming it to be established that such a will is valid, by what rules of law will its contents be interpreted?

The general rule as to interpretation is this—that a will of personalty is to be interpreted with reference to the law of the testator's domicile at the time of making his will. To this rule there are certain qualifications and exceptions, as to which the writers are not altogether in harmony, and which are far too intricate and lengthy for me to introduce them here,

even in the most compressed form. You will find the subject dealt with in Mr. Dicey's book (pp. 306—308), and in Mr. Westlake's work on Private International Law (pp. 125—129), and I sincerely hope that those of you who refer to those authorities, as I have done, will gain a more clear and satisfactory knowledge of the state of the law than I have been able to do, and will not rise from the task with quite such a bad headache as I did.

But whatever may be the difficulties in the construction of wills to which complications of domicile may give rise, there are certain practical lessons to be drawn from the law of this subject which you and I will be wise to lay to heart.

Practical
lessons.

You do not need me to tell you that, unless in some extraordinary emergency in which nothing better can possibly be done, no solicitor ought to prepare a will in ignorance as to the law by which its provisions will be construed; which is only another way of saying that an English lawyer should only prepare a will which will certainly be interpreted by English law, unless in the exceptional cases of his being either acquainted with the foreign law applicable to the particular circumstances, or of there being no practicable alternative to his preparing the will for what it may be worth. For an English lawyer to attempt to prepare a will by which personal estate in Spain or Germany is intended to pass, without any knowledge of the interpretation which will be put upon its provisions in Spain or Germany, is a manifest absurdity.

Bearing in mind, then, the rule that a will of personal estate is interpreted according to the law of the testator's domicile, the matter seems to resolve itself, for practical purposes, into the following tolerably simple propositions:—

Where client
domiciled
Englishman.

(1) If your client is a domiciled Englishman, you will prepare his will without hesitation, but in so far as it may deal with personal estate situate in a foreign

country, you will not pledge yourself, as an English lawyer, to the construction which will be placed on it, in so far as the foreign personalty is concerned, and you will advise your client to take steps, or allow you to take steps on his behalf, to ascertain what will be the effect of the will, and whether he should make a separate disposition in some other form of his personal estate situate in the foreign country.

(2) If your client is domiciled in a foreign country, you will act rightly in admitting your inability to prepare his will with any certainty that it will give effect to his wishes, unless and until you have ascertained the law bearing on the subject in that country; and the result of doing so may be to satisfy you that his right course will be to act under the advice of someone skilled in the laws in force there. Mr. Dicey, indeed, holds (*w*) that, where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be construed with reference to the law of that country. If this view were adopted all the world over, an English draftsman might with all boldness prepare here the will of a testator domiciled abroad bequeathing personal estate wherever situate. But I am not aware that this is a recognized principle of international law, acted upon in the Courts abroad when dealing with wills prepared in this country, and, even as a principle of English law, I do not find it to be by any means free from doubt. Mr. Westlake, for instance, in his book on Private International Law, cites a case of *Anstruther v. Chalmer*, decided in 1826, and reported in 2 Simon, in which, the testator's domicile being English, a legacy lapsed under the English rule of construction, though it would not have lapsed by the law of the country where, and in the technical language of which, the will was made. If that decision is good

Where client
domiciled
foreigner.

(*w*) Dicey's Law of Domicil, p. 307.

law, it follows that the Court here would not pay regard to the English rules of construction, as being applicable to the will of a domiciled foreigner, made here in the technical terms of English draftsmanship. Upon the whole, I cannot venture to advise you to rely on Mr. Dicey's proposition as a qualification of the general rule that a will is interpreted according to the law of the domicil.

Where
client's domi-
cil in doubt.

(3) The third and only remaining case with which you may have to deal does not often arise. It is that in which any doubt exists as to where your client is domiciled. If there is a real substantial doubt on this point, it will be beyond your power to solve it conclusively, but as the question of a man's domicil turns largely on his intention, you may place valuable evidence on record by inserting in his will a declaration by him that he is domiciled in such and such a country. For the rest, I can only advise you to walk carefully in such a case, to weigh the question of domicil in all its bearings, and, if it is open to grave doubt whether a will made according to English law will, either as to its validity in point of testamentary capacity and formalities of execution, or as to the interpretation to be put upon it, pass the testator's personalty in accordance with his wishes, then it will be your duty to place your client in possession of your doubts, and to impress upon him the need of allowing you to ascertain by inquiries at the consular office of any foreign country in which he may be held to have been domiciled, or by consulting some expert in the law of that country, or in some other way, how the law stands as to testamentary dispositions in that country; and, as the result of doing so, it may be found very necessary that he should execute not only a will in English form and with English formalities, but also one, or possibly even more contemporary wills, in a different form and attended by different formalities.

Probate.

To pass to my next subject. You are all aware that,

apart from all the differences of construction and language in devises and bequests of real and personal estate, there is a very important distinction in point of form, which is thus expressed by Mr. Joshua Williams (x):—"A will of lands has always operated, and still operates, as a mode of conveyance, requiring no extrinsic sanction to render it available as a document of title. But a will of personal estate has always required to be proved." The writer then proceeds to deal with the subject of proof of a will, but that is beside my purpose, which is, to refer very shortly to the appointment of an executor, without which no will is complete, though the omission of such an appointment is not fatal to the instrument.

The first question which crops up in this, as in all other cases, when one is dealing with any class of persons to whom the performance of a legal act is entrusted, is that of competency. As to legal competency of executors.

Neither the legal disabilities which apply to the making of contracts, nor those applicable to the making of wills, furnish the test of the legal competency of an executor to accept that office. Not only every person of full age, *sui juris* and *compos mentis*, may be an executor, but even married women, infants, felons, outlaws, and bankrupts are not incompetent to take the office (y).

In the case of infants, however, the Statute 38 Geo. 3, c. 87, sect. 6, provides that if an infant be appointed *sole* executor, he is disqualified during his minority, and administration *cum testamento annexo* is to be granted to his guardian, or such other person as the Court thinks fit, until the executor reaches the age of twenty-one. Infants.

With regard to the appointment of a married woman as executrix, the text writers were not all agreed, before the Married Women's Property Act, 1882 (45 & 46 Married women.

(x) Williams' Personal Property, 11th edit. p. 385.

(y) See Browne's Principles and Practice of the Court of Probate, p. 128.

Vict. c. 75), became law, as to whether a married woman could or could not accept the office of executrix without her husband's consent. But we need not cudgel our brains on the point, as the statute in question has, by the conjoint operation of the 1st, 2nd, and 24th sections, clearly emancipated married women from any real or supposed marital control, and rendered them fully competent to accept the office whether their husbands like it or not. If I were to hazard a guess, I should say that, as a general rule, a husband would decidedly not like it, and in spite of the Act would, by, we will say, a process of gentle persuasion, induce his wife not to act in the character of an executrix against his wishes.

By an odd juxtaposition of ideas, you will find that the word "contract" is, in the Married Women's Property Act, 1882, made by the 24th section to do duty in the very extended sense of including "the acceptance of "any trust, or of the office of executrix or administratrix," and it is in the application of this signification to it that the statute confers on married women the right to which I have just referred.

Lunatics and
idiots alone
incompetent.

Practically, then, I think you may take it that lunatics and idiots are the only persons incapable of being executors, and it has even been held as to this sort of incompetency that mere weakness of mind, especially if it were known to the testator, does not amount to a disability (z).

Corporation.

So wide, indeed, is the legal area within which to select a competent executor, that a corporation may be appointed executor, and in such a case letters of administration will be granted to a syndie nominated by the corporation to take the grant (a).

Thus you will see that, as a question of law, the selection of an executor gives no trouble. But from

(z) *Evans v. Taylor*, 2 Robert. p. 132.

(a) *In b. Darke*, 1 Sw. & Tr. 516.

another point of view it is often a difficult and anxious matter—I mean the choice of fit and proper persons.

It is self-evident, to begin with, that however lawful Choice of
executors. may be the appointment of an infant, a bankrupt, a felon, or a person of weak mind not amounting to idiotey, such an appointment would, as a matter of common sense, be the height of folly. And, as to the appointment of a married woman, speaking generally and with all respect and gallantry to the other sex, I think it is undesirable, except as between husband and wife, to appoint a female executor, whether married or single, for this reason if for no other, that in ninety-nine cases out of a hundred she will, from ignorance of business matters, and almost from the necessity of the situation, act merely as the echo of others, and do and sign whatever she may be advised without having any real means or opportunity of forming an independent judgment.

The selection of an executor is, of course, a matter which must rest with the testator. But it appears to me that a very inappropriate and undesirable selection is often made, not exactly owing to any fault on the solicitor's part, but because it has not been clearly brought home to the testator's mind, by his advice, what is involved in the office. Many laymen have naturally only a very shadowy idea on this point, and limit themselves in making the appointment solely to the consideration of choosing trusted relatives or friends, who will not misappropriate the funds which come to their hands, and will have a kindly feeling towards the beneficiaries. But however important these points may be, they surely do not cover all, or nearly all, the ground. To me it seems that a testator, in selecting his executors, should, if possible, have regard also to the nature of the duties which they will have to discharge. Suppose, for instance, that your client is engaged in commercial pursuits, is a member of one or more firms, or, as the case may be, is carrying on business alone, and there is a

probability that at the time of his death complicated matters will have to be adjusted, or his business may have to be carried on as a going concern, for a while at least, for the purpose of realising and winding up his estate. In such a case it is very desirable, in the interests of the beneficiaries, that one at least of his executors should have some familiarity with business affairs—if possible, of the same description of business affairs as that in which the testator is engaged—and that the whole burden of administration should not be cast upon the rector of a country village, or a captain in the army, however efficiently he may be supported by professional advice and assistance. I do not wish to press this point too far, but I suggest that a solicitor may have the opportunity of giving sound and valuable advice upon it, and, consequently, that you may usefully bear it in mind.

Powers of and protection to executors and trustees.

In close connection with the subject of the appointment of an executor is that of the powers and protection afforded to him, and also to the trustee of a will, in the discharge of his duties. In former times it was an essential part of the draftsmanship of a properly-framed will to insert provisions for the indemnity of trustees in respect of involuntary losses and otherwise, and for entitling them to deduct all expenses incurred in carrying out the trust, and also provisions empowering executors to compound debts and make arrangements as to their testator's estate.

Lord St. Leonards' Act.

The insertion of what were commonly called indemnity and reimbursement clauses was, however, rendered unnecessary by a provision of Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 31) still in force, which enacts that every deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect stated in the section. The section then sets out fairly

comprehensive clauses, such as were up to that time customarily inserted in deeds and wills.

In the following year Lord Cranworth's Act (23 & 24 Vict. c. 145) was passed, and the 30th section of that Act rendered unnecessary the common clause for enabling executors to compound debts and make arrangements. But the 30th section has given place to a wider and larger provision in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41, s. 37). You will find, on referring to this section, that it empowers executors to pay or allow debts and claims on any evidence they think sufficient, and also confers powers on executors and trustees to accept a composition or security for a debt, or for any property claimed, to allow time for payment of debts, to compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing relating to the testator's estate or the trust, and to enter into such instruments and do such things as they may consider expedient in the exercise of these powers without being responsible for any loss occasioned by any act or thing so done in good faith.

Lord Cranworth's Act.

Conveyancing Act, 1881.

The effect of this section is suggested by Messrs. Clerke and Brett (*b*) to be to shift the onus of proof, where any particular transaction is impeached, from the trustee to the *cestui que trust*, so that, whereas formerly a trustee had to justify his action in compromising and compounding, a dissatisfied *cestui que trust* must henceforth prove impropriety of motive.

Messrs. Hayes and Jarman in their Concise Precedents of Wills (*c*) write of this same section in the following terms:—"Apparently this section will afford
"to trustees acting in good faith a much-needed protection against many things which are technically
"breaches of trust, and for the consequences of which

(*b*) Clerke & Brett's Conveyancing Acts, 2nd edit. p. 142.

(*c*) 9th edit. p. 110.

“trustees have been heretofore held liable.” They add that in *Jones v. Owens* (before the Court of Appeal in July, 1882) it was suggested by the Master of the Rolls (Sir G. Jessel) that, for the future, in cases falling within the section, the question would not be “Was it a breach of trust?” but “Was it done in good faith?”

General result
of legislation
on this sub-
ject.

To sum up, from the draftsman's point of view the matter comes, I think, to this, that the legislature has now given to executors and trustees as large a measure of protection as the most ingenious draftsman could have hoped to secure for them—I would rather say a larger measure, because the statutory provision is naturally likely to have a much greater effect upon hitherto-received general principles than the language used in an individual case. Consequently, provisions of this nature may properly disappear from a will prepared to-day. And from the larger point of view of the lesson to be learnt from it by a lawyer, it may be said that the section has dealt a heavy blow to the so-called, and, in my opinion, so falsely called, equitable principles by which the acts of executors and trustees were judged by the Court, and against which the strong sense and powerful intellect of the late Sir George Jessel revolted, before this Act was passed, as you will, I think, gather from more than one of his judgments, and particularly from that delivered in the Court of Appeal in the case of *In re Speight, Speight v. Gaunt* (d), of which case it was observed, in the course of the argument of a later case (e), that the Court of Appeal had by its decision restored to its old vigour Lord Hardwicke's rule in *Ex parte Belchier* (7 Amb. 218), which had been overlaid by decisions of Courts of first instance.

From the executor I now pass to my next stage—the subject of legacies of personal estate.

(d) L. R., 22 Ch. Div. 727.

(e) *In re Godfrey, Godfrey v. Faulkner*, L. R., 23 Ch. Div. 491.

I suppose that no articulated clerk ever went up to pass even his Intermediate Examination without having at the tips of his fingers the three classes into which legacies are divided—that is to say, general, specific, and demonstrative, of which the last is a sort of hybrid mixture of the other two. But knowledge acquired for examination purposes has a tendency to melt when the occasion has passed, and is not always stowed away for practical use afterwards. At the risk, therefore, of handling a subject with which most of you are already familiar, I propose to refer shortly, and as practically as I can, to the characteristics of these different kinds of legacy.

The three
classes of
legacy.

The leading authority upon the distinction between a general, a specific and a demonstrative legacy, and upon the question what amounts to an ademption of a specific legacy, is the case of *Ashburner v. Macquire*, decided in 1784 by Lord Thurlow, and reported in Tudor's Leading Cases in Equity (*f*). And a leading case it certainly ought to be if deliberation on the part of the judge has anything to do with the ingredients of a leading case; for, according to Lord Alvanley (*g*), Lord Thurlow took two years to consider his judgment.

It is often a matter of nicety to determine upon the construction of a will under which of these three classes a legacy falls, but the fineness of distinction which, in given cases, exists between them affords little excuse to the draftsman of a will who confounds one with the other, because it is his clear and manifest duty to give effect to the testator's wishes, and inasmuch as each class of legacies possess, as I shall show you, some special characteristics which distinguish it from the other, it cannot be said that the testator's wishes are fulfilled when, for instance, a legacy, meant by the testator to

(*f*) 3rd edit. Vol. II. p. 245.

(*g*) 4 Ves. 566.

be specific, is, by careless draftsmanship, suffered to assume the shape of a general or demonstrative legacy. It will be well for us to bear clearly in mind the points of difference between these several classes of legacy; and I will therefore now proceed to state them, and will then add a few words as to the practical lesson which they teach us.

General
legacy.

A *general* legacy is a legacy which does not amount to a bequest of any particular thing or money, distinguished from all others of the same kind (*h*). It is payable only out of the general assets of the testator, and ranks after payment of his debts and of his specific and demonstrative legacies. From this it follows that if the testator's assets are not sufficient to meet his debts as well as legacies of the other two classes in full, his general legacies will abate. On the other hand, a general legacy, not being payable out of any specified fund or asset, will not be liable to the incident of ademption which I am about to explain.

Specific
legacy.

A *specific* legacy is defined by Mr. Joshua Williams (*i*) to be a bequest of a specific portion of the testator's personal estate, but that definition strikes me as being singularly incomplete, and, I would even venture to add, misleading. I much prefer the description of this class of legacy in the notes to *Ashburner v. Macquire*, in Tudor's Leading Cases (*j*), viz., that it is "a bequest of a particular thing or sum of money or debt as distinguished from all others of the same kind," and still more a very recent definition propounded by the present Lord Chancellor, in a case of *Robertson v. Broadbent* (53 L. J. R., Ch. Div. p. 267), viz., that a specific legacy includes "everything which a testator, identifying it by a sufficient description and manifesting an intention that it should be enjoyed or taken in the

(*h*) Tudor's Leading Cases, 3rd edit. Vol. II. p. 252.

(*i*) Williams' Personal Property, 11th edit. p. 401.

(*j*) 3rd edit. Vol. II. p. 252.

“state and condition indicated by that description, “separates in favour of a particular legatee, from the “general mass of his personal estate, the fund out of “which pecuniary legacies are, in the ordinary course, “payable.” As I have already indicated, a specific legacy possesses over a general legacy the advantage that, upon a deficiency of general assets to pay debts, it will not be obliged to abate until after the general legacies have been exhausted; but, on the other hand, as compared with general legacies, it has this disadvantage, that if the particular specific thing given is afterwards adeemed by the testator, whether by his disposing of it in any way or changing its character, the legatee will lose his legacy, and will have no right of recourse to the general personal estate to have it in any way made up to him.

A *demonstrative* legacy was described by Lord Thurlow, in *Ashburner v. Macquive*, as being “a legacy in its nature “a general legacy, but where a particular fund is “pointed out to satisfy it” (k). Demonstrative legacy.

This is the most favoured of the three classes. It does not abate like a general legacy, and it is not liable to ademption like a specific legacy, for if the particular fund pointed out by the testator is not in existence at the testator's death, the legatee is entitled to have his legacy made good out of the general assets. Thus, if a testator says, “I leave my 1,000*l.* London and North “Western Railway Stock to A. B.,” and afterwards disposes of that stock, the legacy is specific, and A. B. gets nothing; but if he leaves a legacy of cash, with a direction that it is to be paid “out of” a particular stock—as if he says, “I leave 1,000*l.* out of my London “and North Western Railway Stock to A. B.,” and afterwards sells all that stock—the legacy is demonstrative, and A. B. will get his 1,000*l.* out of the general

(k) Tudor's Leading Cases, 3rd edit. Vol. II. p. 246.

assets. The distinction between the two cases may be referable to the highest principles of justice, but it is too delicate and subtle for my limited comprehension, and I must confess that in the case of wills not prepared with professional aid—to which sort of will, remember, the law is by way of showing every kind of indulgence—most testators would be rather astonished at the important result of this comparatively slight difference in their mode of expressing themselves. But it is the law, and that is enough for you and me.

So much as to the special features of each class of legacy. It is, I think, obvious that a thorough knowledge of them may usefully be applied as between a solicitor and his client, first at the stage of taking instructions for a will, and secondly at the later stage of draftsmanship.

Solicitor's
duty.

A client, when he instructs you to prepare his will, may jot down his wishes on paper, or he may express them verbally, and you will take written notes of their substance. If in either mode you learn from him that he wishes to leave John Smith a legacy of 100*l.* simply, there will be no difficulty in divining that he means to leave John Smith a legacy of that amount payable out of his general assets. If, again, he tells you that he desires to leave to John Smith this or that picture or piece of plate, or other specific article, you will accept the instructions as clearly indicating an intended specific legacy. But if he refers to stocks or shares, or any other species of property, in such terms as to raise the least doubt whether he would desire the legacy to fall under one or the other of the different classes, then it will be your duty to clear up the doubt, and, so far as may be necessary for that end, to explain to him the legal consequences of one and the other of the different classes of bequest.

When you have reached the point of being quite clear as to your client's wishes, there will remain the

duty of giving effect to them. In most cases this will present no great difficulty. You will easily enough express, with or without the aid of any standard book of precedents, or other assistance of the same description, a general legacy of 100*l.*, a specific legacy of some particular picture or sum of stock belonging to the testator, or other specific subject distinct from anything else owned by him, or even the less common demonstrative legacy of a sum of cash to be raised from some particular fund. The most important matter to bear in mind for general guidance is, I think, this—that the Court leans somewhat against construing a legacy to be specific or demonstrative, unless it is very clearly so expressed, because of the position of vantage which such legacies occupy as compared with general legacies. For example, you might perhaps suppose—I certainly should—that if a testator leaves to A. B. a diamond ring, or a horse, without identifying any particular ring or horse, the legacy would, nevertheless, be considered demonstrative, and the legatee entitled to have his ring or horse purchased, without being subjected to abatement in common with ordinary money legacies. Such is not, however, in fact, the case (*l*). The absence of reference to a specific ring or horse would reduce the legacy to the level of a general legacy, and if the testator desires to give it priority over general legacies in the matter of abatement, he must either identify the gift specifically with something belonging to him, or he must create the priority in express terms (*m*). In the examples which I have just given, the matter is, of course, comparatively unimportant, but it is of real substantial importance in some cases. For instance, a bequest of a sum of money to be laid out in the purchase of an annuity is, without more, a mere general legacy, liable to abatement with the rest. But it may

(*l*) Tudor's Leading Cases, 3rd edit. Vol. II. p. 253.

(*m*) *Ibid.* p. 252.

be that in a particular case the testator may desire this annuity to have a preference over all his other legacies, and that his intention will be defeated if it is liable to abatement in common with them. In such a case it will be necessary to insert words expressly giving such a priority to it. And remember, that in this, as in so many other things, the point may not even occur to the testator himself. He may be supposing in his own mind, until and unless you enlighten him, that the gift will have a priority over any other legacy without express words, or the contingency of abatement may not even have crossed his mind. Men who have lived out of the business world are often like children in such matters, and look to their solicitor to play the part of guide, philosopher and friend in all their affairs; and many men, again, whose thoughts are filled with a thousand other things, expect their solicitors to save them the trouble of thinking about their wills by suggesting all needful points.

I do not multiply instances of forms of words which do and do not amount to the one or the other of these classes of legacy. If I gave you a thousand particular illustrations I should probably leave out just that thousand and first which may be the very one you will have to deal with. Moreover, I should be stepping far over the line, within which it has been my effort throughout to keep, if I passed from general principles to particular cases. My purpose is not to attempt the hopeless task of showing you, in the compass of nine Lectures, how to deal with this, that and the other special combination of individual circumstances, but to do my best to encourage you to arm yourselves with those general principles which apply in the largest sense to *all* circumstances. Once master them thoroughly, and all the rest will be added in any particular case by reference to the Treatise, the book of Precedents, or, as the case may be, to some decision in another case which

governs your own, or again, by recourse to some learned counsel. Neglect them, and though you have all the law-books ever published at your command for reference, you will not do your duty effectively, for this one conclusive reason, that the practitioner to whose mind the general principles of law are not familiar will stumble blindly on his way, and will in countless instances fall short of protecting his client's interests and giving effect to his wishes, because, when a given state of circumstances is presented, he will not be alive to the points to which he should direct his attention. It may, perhaps, cross the minds of some of you, as you read these words, that you have already encountered a good many solicitors who seem to get along somehow without knowing much about any general principles. So have I. But they do get along, and that is all; and even if they succeed in satisfying their clients, you may be quite sure that they would, with few exceptions, take a much higher and worthier position in the profession than they do, and serve their clients infinitely better, if they acted upon the golden rule of thoroughly mastering first principles. Moreover, my duty is not discharged by pointing out to you the *least* that you can do in order to scrape along and keep clear from actions of negligence, but to impress upon you the wisdom of following steadily the paths marked out in front of a well-constructed, competent solicitor.

The last topic to which I am going to draw your attention is one which may well appear to you to lie outside the confines of a Conveyancing Lecture, being none other than the equitable doctrine of satisfaction. But, in truth, that doctrine has so direct a practical bearing upon the preparation of a will, that I cannot forbear to call your attention to it from that special point of view. And, indeed, for that matter, the art of conveyancing is so inseparably associated with the science of equity that the one constantly overlaps the other,

Doctrine of satisfaction.

and I have often thought when I have taken up a conveyancing paper set at the final examination of solicitors that half the questions might with perfect propriety be turned loose into the paper on equity, and *vice versâ*.

Arises in
three cases.

The doctrine of satisfaction may arise in three states of circumstances.

First case—
Gift subse-
quent to will.

First, where the giving of a legacy by will is followed by a gift from the testator in his lifetime to the legatee. This, as you will see, depends upon the acts of the testator subsequent to the execution of his will, and, as it does not bear upon the terms of the will, I pass it by without any observation beyond saying that you will find it exhaustively treated of in the case of *Ex parte Pye*, and the notes upon that case in Tudor's Leading Cases in Equity (*n*).

Second case—
Gift previous
to will.

Secondly, the satisfaction by a legacy of a portion given previously to the execution of the will.

The rule which governs this class of satisfaction has been thus expressed: "Wherever a legacy given by a parent or a person standing *in loco parentis* is as great as, or greater than, a portion or provision previously secured to the legatee upon marriage or otherwise, then, from the strong inclination of Courts of Equity against double portions, a presumption arises that the legacy was intended by the testator as a complete satisfaction; and if the legacy is not so great as the portion or provision, a presumption arises that it was intended as a satisfaction *pro tanto*; and the bequest of the whole or part of a residue will, according to its amount, be presumed either a satisfaction of a portion in full or *pro tanto*" (*o*).

This doctrine is strongly rooted in equitable soil—so strongly as to have led Mr. Joshua Williams to observe of it (*p*) that the presumption of satisfaction is so strong

(*n*) 3rd edit. Vol. II. p. 331.

(*o*) *Ibid.* pp. 354, 355.

(*p*) Williams' Personal Property, 11th edit. p. 403.

that it is difficult to say what circumstances of variation between the portion and the legacy will be sufficient to entitle the child to both.

The moral to be drawn from this doctrine—remember that I am speaking to you of the draftsmanship, and not of the construction of an instrument—is that such a matter should not be left to be decided by any test of variation or similarity between the portion and the subsequent legacy. If a testator covenants by a settlement made on his daughter's marriage to pay a sum of 5,000*l.*, and he then leaves her a legacy of 10,000*l.* by his will, the legacy will wipe out the covenant, and the daughter will get, not 15,000*l.*, but 10,000*l.* That is the doctrine. But is there any particular reason to suppose in such a case that the testator—whom we may safely assume to know as much about the doctrine of satisfaction as he does about the Koran—*meant* this result to follow? It may be said that in such a case, although the testator did not know of the construction that would be placed on his will, at all events his solicitor, if it were prepared by a solicitor, would have known of it. I answer, that if it were prepared by a solicitor, and the solicitor did know of the previous covenant, and the application of the doctrine to the particular case, he would never have dreamt of inserting the legacy without any reference to the covenant, on the strength of the constructive doctrine, but would have referred in terms to the covenant, so as to show, on the face of the will, that 5,000*l.* of the 10,000*l.* was meant to be in discharge of the testator's covenant. If I were to hazard a guess I should say that in half the cases to which the doctrine applies it violates, and does not carry out, the testator's wishes. But, however that may be, I have no hesitation in advising you that the right course in all cases in which there is a possibility that the will may operate on some previous provision for a legatee towards whom your client stands *in loco*

parentis is to inform yourself first whether any such antecedent obligation does exist, and, if you find it does, then what the testator's wishes are as to the operation of the one provision upon the other. When you have once gained this information nothing can be easier than, by the express terms of the will, to give exact effect to his real intention, and exclude the application of this hazardous equitable doctrine.

Third case—
Legacy to
creditors.

The third state of circumstances in which the doctrine of satisfaction may come into play is where a testator, being indebted to a person, gives that person a legacy by his will. The rule as to this class of satisfaction is laid down in the leading case of *Talbot v. The Duke of Shrewsbury* (q), of which the head note is, "A debtor, without taking notice of the debt, bequeaths a sum as great as, or greater than, the debt to his creditor—this shall be a satisfaction: *secus*, if it were bequeathed on a contingency, or if it were less than the debt."

If I may be permitted so irreverent an observation, I should say that, in the supposed case, the creditor to whom the legacy is bequeathed would feel mighty little satisfaction in fact, however much he might be satisfied in law.

Against the doctrine to which I am now referring text-writers and judges alike have constantly declaimed, upon grounds obviously referable to common sense and justice. Strangely enough, however, although it was assailed by Lord Chancellor King as long ago as 1725, and has often been roughly handled by eminent judges since, the rule stands as good law to this day. But the disfavour shown to it has, at least, had this result—that it has been cut down by the decisions to the narrowest possible limits, and presents, in that respect, the exact converse of the class of satisfaction which we just now

(q) Decided in the year 1714, and reported in "Precedents in Chancery," p. 394; and in Tudor's Leading Cases, 3rd edit. Vol. II. p. 345.

considered, and in favour of which the Court, as I pointed out, has a strong leaning. Thus, if the legacy be less than the debt, or payable at a different time, or of a different nature, or if the debt be contracted subsequently to the date of the will, or if the will contains an express direction for payment of debts and legacies as distinguished from a direction referring to debts alone, the legacy will be no satisfaction (*r*). In short, the Court will seize upon the most minute artificial circumstances as a way of escape from a still more artificial doctrine, of which it is heartily ashamed, though unable, as it seems, to abolish this and some other mischief-making rules of equity which I should extremely like to see despatched about their business.

It will be evident to you from what I have said that this third and last class of satisfaction is not, in degree of importance to the draftsman, comparable to the second class, because of the Court's leaning against it, and of its consequently applying only in a limited range of cases. But it is only a question of degree, and it behoves every solicitor to bear in mind the existence of the doctrine, and to give practical effect to his knowledge of it when proper occasion arises at the same successive stages to which I referred just now—first, when receiving instructions; and secondly, when carrying them out. If it is within the bounds of what is reasonably probable that your client is indebted to a person to whom he leaves a legacy, it will be your clear duty to make enquiry as to the fact, and, granting the fact, to learn the testator's wishes as to whether it is his desire that the legacy is, in actual fact, to be a legacy, or merely the payment of a debt which his executors would have to pay whether he desired them to do so or not; and you would, if necessary, point out to him that, by

(*r*) Haynes' *Outlines of Equity*, pp. 341—344; Williams' *Personal Property*, 11th edit. p. 403; Tudor's *Leading Cases*, 3rd edit. p. 367 *et seq.*

a process of reasoning which has been a fearful and wonderful marvel to all sane lawyers ever since, a learned judge in the year 1714 laid down a rule of interpretation which necessitates the exercise of care in dealing with a gift by will to a creditor.

Importance of
doctrine to
practitioner.

I need not dwell further on this subject, and I leave it with the expression of a hope that I may have convinced you that you have need of being familiar with the equitable doctrine of satisfaction, not merely because you may think that it is a likely subject for an examiner to pitch upon, but for the very much more important and serious reason that you will have occasion to bear in mind its leading general principles—I do not say its intricate refinements and distinctions, because they do not, in my judgment, concern the draftsman however necessary it may be to refer to them where a question of doubtful construction is concerned—if you aspire to be competent legal practitioners and sound draftsmen.

I dry the ink on the last page of these Lectures with reluctance. Their preparation has for many months engrossed a large proportion of the scanty hours of leisure permitted to a practising solicitor; but the task has been one of ever-increasing attraction to me. The best hope I can have for the result is that it may contribute, in however small a degree, to promote in those who are entering my profession, a desire to gain at the outset of their career the measure of sound knowledge which can alone enable them to grapple successfully with the difficulties and stumbling-blocks which lie in front of the young solicitor.

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